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No. 88-1842

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

OSCAR PORCELLI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Petitioner did not collect state sales taxes from customers on his sales of gasoline, and underpaid the taxes due. Although failure to remit the proper amount was not a crime under state law, petitioner was prosecuted and convicted under federal law for mail fraud and RICO violations. After his conviction, this Court decided *McNally* v. *United States*, 107 S. Ct. 2875 (1987), holding that the mail fraud statute covers only schemes to deprive a victim of its money or property. The questions presented are:

1. Did the court below err in upholding the mail fraud convictions when petitioner did not collect the taxes and therefore never deprived the State of *its* property, on the new theory—neither charged in the indictment nor presented to the jury—that the State had an intangible property interest in its right to sue for the unpaid taxes, and that petitioner temporarily deprived the State of this "property"?

2. Did the court below err in upholding the use of a federal criminal RICO prosecution to collect state sales taxes, when the State itself had not even made it a crime to underpay the taxes, and the only predicate for the RICO prosecution was the mailing of the state tax returns?

PARTIES TO THE PROCEEDINGS

Petitioner Oscar Porcelli was defendant-appellant below. The United States of America was plaintiff-appellee.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Oscar Porcelli respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled proceeding on January 11, 1989, and amended on February 14, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 865 F.2d 1352 and is reprinted in the appendix hereto ("App.") at 1a. The District Court issued opinions on June 13, 1986, May 27, 1987, and September 16, 1987, which are unreported and reprinted at App. 38a, 43a, 78a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1989, App. 102a, and rehearing was granted in part and denied in part on February 14, 1989. App. 35a. On March 30, 1989, Justice Marshall entered an order extending the time in which to file the petition for certiorari to and including May 15, 1989. App. 104a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The pertinent provisions of the mail fraud statute, 18 U.S.C. § 1341, and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.*, are set forth at App. 105a-110a.

STATEMENT OF THE CASE

On December 19, 1985, petitioner Oscar Porcelli was indicted by a federal grand jury sitting in the Eastern District of New York. The indictment alleged that certain retail gasoline stations owned or partially owned by Porcelli had filed false state sales tax returns between 1978 and 1982, resulting in an underpayment of state taxes by some $4,755,000. As the court below acknowledged, such underpayment was not a crime under New York law at the time it occurred, instead subjecting the taxpayer to a civil action to collect the unpaid taxes, plus penalties and interest.[1] Relying on the mailing of the state sales tax returns for the gasoline stations, however, the federal prosecutor charged that Porcelli was guilty of the federal crime of mail fraud, in violation of 18 U.S.C. § 1341.

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[1] *See* App. 3a, 8a; *People* v. *Valenza*, 60 N.Y.2d 363, 457 N.E.2d 748, 750 (1983) (state legislature intended that "the failure to pay over sales taxes may not be considered criminal conduct and is subject to civil penalties only").

After Porcelli refused to enter into a plea bargain, the prosecutor sought and the grand jury returned a superseding indictment, adding to the mail fraud charges one count of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c). The only alleged predicates for the RICO charge were the federal mail fraud charges arising out of the mailing of the state tax returns which reflected the underpayment of sales taxes.

Porcelli moved prior to trial to dismiss the RICO count, noting that state tax evasion was not among the state law offenses enumerated in the definition of racketeering activity in RICO, 18 U.S.C. § 1961(1)(A), and contending that the government was improperly attempting to "double boot-strap" state tax evasion into a RICO predicate by alleging the state tax evasion as federal mail fraud. The District Court denied the motion, ruling that state tax evasion could be prosecuted as federal mail fraud and that the mail fraud could in turn form the predicate for a federal RICO charge. App. 38a.

At trial the jury was instructed with respect to mail fraud that the government need not prove that the defendant realized any gain from the alleged scheme, "nor is it necessary to establish a scheme to defraud to show that the intended victim in fact suffered any loss, provided always that the scheme contemplates—that the defendant contemplates in the scheme *either* some loss to a victim *or* a gain to the schemers." Ct. App. JA at A-315 (emphasis added). The point was reiterated later in the instructions: "Intent to defraud means to act * * * for the purpose of *either* causing financial loss to another *or* bringing about some financial gain to oneself." *Id.* at A-317 (emphasis added).

On December 16, 1986, the jury found Porcelli guilty of mail fraud and the RICO violation. The next day the jury returned a forfeiture verdict under RICO, directing

that Porcelli forfeit $4,755,000—the amount of the unpaid taxes—*plus* 34 corporations that he owned. The corporations—including real estate companies, a trucking company, a construction company, and a security firm—were not alleged to have underpaid taxes or done anything else wrong themselves, but simply to have benefitted from funds Porcelli might otherwise have used to pay the sales taxes owed by the stations.

The District Court denied Porcelli's post-trial motions, App. 43a, 78a, and entered judgment on September 30, 1987, sentencing Porcelli to concurrent prison terms of two years on each count, with six months to be served, and probation for five years following release. App. 96a. The court also entered a judgment of forfeiture under RICO, ordering that Porcelli forfeit to the United States $4,755,000, plus the 34 corporations. The judgment directed that the State of New York be paid the amount of unpaid taxes, penalties, and interest out of the proceeds of the forfeiture, and that the United States take the rest, up to twice the amount of taxes and interest Porcelli owed New York. App. 99a. Finding that there were "substantial grounds for appeal," the District Court stayed the sentence and forfeiture pending appeal. Ct. App. JA at A-474.

Porcelli argued on appeal, *inter alia*, that this Court's decision in *McNally* v. *United States*, 107 S. Ct. 2875 (1987), required reversal of his mail fraud convictions, and therefore of his RICO conviction. Porcelli also renewed his argument that RICO did not cover underpayment of state sales taxes, particularly where such underpayment was not a crime under state law. A sharply-divided panel of the Second Circuit affirmed Porcelli's convictions. The majority conceded that "the prosecution of a state sales tax evader for a RICO violation pushes that law to its outer limits, especially when that tax evasion was not made criminal by the state itself at the time that the fraudulent returns were filed." App. 3a. The

majority ruled that it would "nevertheless affirm the convictions * * * by virtue of the extraordinarily broad sweep of RICO and of the federal mail fraud statute and despite *McNally*." App. 3a.

The majority acknowledged that, in light of *McNally*, the mail fraud statute "protects only a state's interest as 'property-holder.'" App. 11a (quoting *McNally*, 107 S. Ct. at 2881 n.8). The majority stated that Porcelli's argument "achieves an even greater level of sophistication when one recalls the words of *McNally*" that the language employed by Congress in the mail fraud statute usually signifies "'"the *deprivation* of something of value."'"[2] As the court below explained, "[t]he concept of deprivation means obtaining property with an intent not to pay as opposed to mere failure to pay." App. 12a. The majority remarked that Porcelli would have deprived New York of its property *if* he had collected and then failed to turn over the sales taxes, but conceded that "the Government did not prove actual collection of the tax." App. 13a.

The majority nonetheless upheld the mail fraud convictions on the theory that New York had a right to sue Porcelli to obtain the full amount of the taxes due (whether or not he had collected them), that this "chose in action" constituted an intangible property interest, and that Porcelli deprived the State of this "chose in action" by concealing his underpayment. App. 15a-16a. The majority recognized that the State "has not finally been deprived of that chose in action," but concluded, "the fact remains that until the fraud was discovered it had been deprived of its property."[3]

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[2] App. 11a-12a (quoting *McNally*, 107 S. Ct. at 2881, quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)) (emphasis added by court below).

[3] App. 15a-16a. The court reversed the forfeiture ordered by the District Court as overly broad, because it included corporations

Judge Jon O. Newman dissented. He noted that New York had not even pursued its available civil remedy against Porcelli, but instead the federal government had prosecuted him criminally under the mail fraud and RICO statutes, subjecting him to imprisonment and a forfeiture of three times the unpaid taxes. As Judge Newman stated, "[b]efore tolerating such an extraordinary disparity between federal and state enforcement techniques, especially as to a matter so central to the prerogatives of states as the collection of their own taxes, courts should be scrupulous in making sure that the conduct punished under federal authority falls within the reach of federal statutes." App. 28a. He concluded that the mail fraud statute, as construed in *McNally*, did not cover Porcelli's conduct, and that even if the statute could be applied pursuant to the majority's novel theory, the conviction was invalid because that theory was neither charged in the indictment nor presented to the jury. App. 28a-34a.

Judge Newman noted that *McNally* "requires us to reconsider the continued validity of [the] line of cases" upholding use of the mail fraud statute to prosecute failure to pay state taxes. App. 29a. At least in a case such as this one, in which the defendant did not collect the taxes, *McNally* is not satisfied because the defendant does not deprive the State of *its* property. As the dissent concluded:

> Once Porcelli failed to collect the sales taxes, he became liable for the amount he should have collected, but that amount, in his hands, was still his property, not New York's. He owes New York the amount of sales taxes he should have collected, but a debtor

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as to which the government had failed to prove any direct receipts from the gas stations that filed the false returns, and remanded for further proceedings limited to the forfeiture question. App. 24a. The questions presented in this petition concern the validity of the underlying convictions and do not involve the entirely separate outstanding forfeiture issues.

> does not deprive his creditor of the creditor's property simply by failing to pay the debt. * * * Though the mail fraud statute has been given broad application, it has never been interpreted to cover non-payment of debt and may not be so interpreted after *McNally*. [App. 32a.]

In any event, the dissent reasoned, the majority's theory "was not charged in the indictment, nor presented to the jury," and thus could not support Porcelli's conviction. As Judge Newman concluded, "[w]e should not strain to uphold a federal conviction for non-payment of state taxes, a matter best left, in the absence of clear federal law coverage, to the abundant civil and criminal authority of the states." [4]

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant The Writ To Resolve The Conflict Among The Circuits Over Whether Failure To Disclose Accurate Information Deprives A State Of Its Property Under *McNally*

Two years ago in *McNally* v. *United States*, this Court held that the mail fraud statute was "limited in scope to the protection of property rights," and required a showing of a scheme to deprive the victim of its money or property. 107 S. Ct. at 2879, 2881. *McNally* involved a scheme whereby state officials funneled the State's insurance business to specified insurance agents, in exchange for a share of the commissions earned by those agents. This Court ruled that the mail fraud statute was not violated because the scheme did not deprive the State of its property. As Justice White noted in his opinion for the Court, "the jury was not required to find that the Commonwealth it-

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[4] App. 33a-34a. Porcelli filed a petition for rehearing and suggestion of rehearing *en banc*. On February 14, 1989, the court issued an order on rehearing clarifying its opinion with respect to the forfeiture issues and denying rehearing in all other respects. App. 35a. On March 3, 1989, the court denied rehearing *en banc*. App. 37a.

self was defrauded of any money or property." *Id.* at 2882. The defendant state officials certainly gained money by receiving part of the commissions from the insurance agents, "but those commissions were not the *Commonwealth's* money." *Id.* (emphasis added).

Justice Stevens suggested in dissent that the Commonwealth may have been deprived of its money in the scheme. He reasoned that when a state official or other employee " 'receives anything as a result of his violation of a duty of loyalty to the principal, he is subject to a liability to deliver it * * * to the principal,' " *id.* at 2890 n.10 (quoting Restatement (Second) of Agency § 403 (1958)), much as the majority below relied upon the fact that Porcelli was "subject to a liability" to pay the taxes he owed to New York. *See* App. 15a-16a. The Court in *McNally*, however, rejected this argument, ruling that a mail fraud violation could not be based on the defendants' "*failure to disclose* their financial interest, even if state law did not require it, to other persons in the state government whose actions could have been affected by the disclosure." 107 S. Ct. at 2882 n.9 (emphasis added).

Shortly after *McNally*, in *Carpenter* v. *United States*, 108 S. Ct. 316 (1987), the Court ruled that the mail fraud statute protected "confidential business information" as property. The case involved a scheme whereby a Wall Street Journal reporter took confidential information belonging to the Journal and revealed it to others speculating in the stock market. This Court held that such a scheme was a deprivation of the Journal's property under *McNally*, because "[c]onfidential business information has long been recognized as property," and the schemers deprived the Journal of its property interest in keeping confidential, and making exclusive use of, *its* information. *Id.* at 320-321. Justice White, writing for a unanimous Court, emphasized that the case was not like *McNally* because the Journal was "defrauded of *much more than its contractual right* to [the reporter's] honest and faith-

ful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute." 108 S. Ct. at 320 (emphasis added).

In this case, the majority below relied on just such an "ethereal" interest—the State's right to pursue a civil action against Porcelli for unpaid taxes—to support a mail fraud conviction. The majority recognized that Porcelli could not be said to have deprived the State of its *money*, because he was not shown to have collected any sales taxes. The scheme may have benefitted Porcelli—as the commission-splitting scheme in *McNally* benefitted the state officials—but just as the commissions in *McNally* "were not the Commonwealth's money," 107 S. Ct. at 2882, so too here the uncollected and unpaid taxes Porcelli owed New York were not New York's money.

The majority below ruled instead that Porcelli temporarily deprived New York of its right to take legal action against him to recover the unpaid taxes, by failing to disclose that he owed them. *McNally* rejected such an approach, ruling that the defendants' failure in that case to disclose their financial interest did not constitute a deprivation of the Commonwealth's property, even if there were "persons in the state government whose actions could have been affected by the disclosure." 107 S. Ct. at 2882 n.9. So too here Porcelli's failure to disclose his unpaid taxes—even if disclosure would have prompted New York officials to exercise their "chose in action" to collect the taxes—cannot constitute depriving New York of its property under *McNally*. In logic and law, concealment that prevents another from taking legal action to *obtain* money or property in the first instance is not the same as depriving that person of money or property it already owns, and only the latter is covered by the mail fraud statute. *See McNally*, 107 S. Ct. at 2881 n.8 ("any benefit which the Government derives

from the statute must be limited to the Government's interests as property-*holder*") (emphasis added).[5]

Carpenter held that intangible property was covered by the mail fraud statute, but that decision does not support the analysis below. In *Carpenter*, the confidential business information belonged to the Journal, and the reporter fraudulently took it, depriving the Journal of its property. Here, the information about Porcelli's underpayment did not belong to New York, and Porcelli did not take it from the State. It was *his* information and he withheld it. As another Circuit ruled recently:

> The information which the prosecution labels "property" was at all times in the possession of the defendants, and the object of their alleged scheme was to withhold, rather than to obtain, this information from the City. Withholding valuable information from the City is not the same thing as depriving the City of its property, and only the latter conduct violates the mail fraud statutes. [*United States* v. *Slay*, 858 F.2d 1310, 1316 (8th Cir. 1988) (Arnold, J.).]

Indeed, this Court has already unanimously ruled that the failure to pay taxes does not deprive the government of property. The issue in *United States* v. *Johnston*, 268 U.S. 220 (1925), was whether an individual who failed to pay taxes owed to the government was guilty of embezzling the government's property. This Court held that

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[5] Even if the court below correctly found that a "chose in action" is a "property right," that would not, of course, end the matter. As other courts have recognized, choses in action—whether or not "property"—are not the sort of property that can form the basis for larceny or embezzlement. *See, e.g.*, *State* v. *Tauscher*, 360 P.2d 764 (Ore. 1961); *Bogan* v. *Wiley*, 202 P.2d 824 (Cal. 1949). The issue under *McNally* is whether the chose in action can be *taken* by the defendant from the victim. The court below failed to address this question, simply equating concealment with deprivation. But Porcelli's concealment in no way prevented the State from bringing a collection action against him; it was free to exercise its "chose in action" at any time.

the taxpayer could not be considered to have taken the government's property because "the person required to pay over the tax is a debtor and not a bailee"—*i.e.*, he is "answerable for a tax" but does not hold *the government's* property. *Id.* at 226-227. This has been the unchallenged rule ever since.[6] Whatever other consequences such conduct may carry, owing taxes and not paying them does not constitute taking property from the government, and thus cannot constitute mail fraud under *McNally*.

In *McNally*, this Court emphasized that the mail fraud convictions could not stand because "the jury was not required to find that the Commonwealth itself was defrauded of any money or property." 107 S. Ct. at 2882. Here, the jury was expressly instructed—twice—that the prosecution need only show that "the defendant contemplates in the scheme *either* some loss to a victim *or* a gain to the schemers." Ct. App. JA at A-315 (emphasis added); *see id.* at A-317. This instruction is clearly wrong under *McNally*. The instruction permitted the jury to find guilt based *solely* on "gain to the schemers," which *McNally* rejected as insufficient. In *McNally* the schemers gained handsomely—as the jury here could have concluded Porcelli did—but that was not mail fraud unless the jury found loss to the victim, something the Porcelli jury was expressly told was not necessary.[7]

The Second Circuit's decision conflicts not only with this Court's opinions in *McNally* and *Johnston*, but also with post-*McNally* decisions from other Circuits. For example, *United States* v. *Gimbel*, 830 F.2d 621 (7th Cir.

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[6] *See, e.g., United States* v. *Dupee*, 569 F.2d 1061, 1064 (9th Cir. 1978) (in *Johnston*, "the property simply did not belong to one other than the defendant"); *United States* v. *Gwin*, 839 F.2d 427, 430 (8th Cir. 1988); *United States* v. *Bailey*, 734 F.2d 296, 302 (7th Cir.), *cert. denied*, 469 U.S. 931 (1984).

[7] *See United States* v. *Ochs*, 842 F.2d 515, 525 (1st Cir. 1988) ("It is difficult to conceive of an instruction more at odds with *McNally*" than one "stating that financial harm is 'irrelevant'").

1987), involved a mail fraud prosecution for failure to report certain currency transactions. The government's theory was that because the scheme "concealed information from the Treasury Department which, if disclosed, might have resulted in the Department assessing tax deficiencies, [the defendant] was in effect depriving the Treasury of tax revenues." *Id.* at 626. This was the theory adopted by the majority below: Porcelli's false returns concealed from New York information that would have prompted the State to exercise its "chose in action" and collect the unpaid taxes from him. The Seventh Circuit, however, held that this argument could not be maintained in light of *McNally*:

> In this case, as in *McNally*, the defendant is accused of not providing information to government officials "whose actions could have been affected by the disclosure," 107 S. Ct. at 2882 n.9. The only possible distinction is that the indictment in this case is based on the deprivation of information to Treasury Department officials, whose primary function is to collect revenue, while the indictment in *McNally* did not refer to a government agency specifically involved in financial matters. However, this distinction is not significant. Had the petitioners in *McNally* disclosed information about their activities to *any* state officials, those officials might have taken action to recoup payments made to the insurance brokerage firm. [830 F.2d at 626-627 (emphasis in original).]

The court expressed "no view" as to whether a scheme to deprive the government of tax dollars could "ever" constitute mail fraud, *id.* at 627 n.3, perhaps reserving the situation in which the taxpayer filed false refund claims and thereby took the government's money. The Seventh Circuit reiterated the reasoning of *Gimbel* in *United States* v. *Eckhardt*, 843 F.2d 989 (7th Cir.), *cert. denied*, 109 S. Ct. 106 (1988), stating that a scheme to conceal information from tax collectors "did not deprive the Department of 'money or property,' even though

the Department might have assessed a tax deficiency had the information been disclosed," and that "it is not sufficient to allege conduct which could have resulted in the government's failure to collect revenue owed it." *Id.* at 996-997 (citing *Gimbel*). That is, however, the basis of the contrary holding of the Second Circuit below.[8]

The decision below also conflicts with the recent decision of the Ninth Circuit in *United States* v. *Egan*, 860 F.2d 904 (9th Cir. 1988). The government argued in that case that the mail fraud conviction of a city councilman for taking bribes should be upheld under *McNally*, because the defendant's conduct violated a state statute. The Ninth Circuit rejected the argument and reversed the mail fraud conviction. It ruled that footnote nine in *McNally*—relied upon by the government—"certainly does not indicate that intangible rights may be the basis of mail fraud convictions if the rights are statutorily protected" and that "the reasoning of *McNally* appears to foreclose the United States' argument." *Id.* at 910. The court recognized that "[a]lthough in recent years some statutory rights have been considered property for some purposes, * * * nothing in the *McNally* opinion, which focuses on the meaning of fraud at the time the statute was codified, suggests that such an expansive view of property is appropriate." *Id.* at 910. Yet the

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[8] *See also United States* v. *Henderson*, 386 F. Supp. 1048, 1053 (S.D.N.Y. 1974) ("The court is of the view that the [mail fraud] statute does not include within its proscription a scheme to defraud the Internal Revenue Service in the collection of income taxes") (Weinfeld, J.); *but cf. United States* v. *Herron*, 825 F.2d 50, 56 (5th Cir. 1987) ("Certainly a scheme to defraud the United States of taxes would meet the 'money or property' requirement of *McNally*, but that is not the case before us today") (dicta). In *Herron* the Fifth Circuit *reversed* a mail fraud conviction on reconsideration after *McNally*, holding that the government was not deprived of property when the defendant was required by law to disclose information about currency transactions but failed to do so. The court ruled that the "government had no proprietary interest in the * * * information it failed to obtain from [the defendants]." *Id.* at 57.

majority below upheld Porcelli's mail fraud conviction on the basis of just such an expansive view, finding the requisite deprivation of property in the concealment of New York's statutory right—its "chose in action"—to collect the unpaid taxes. App. 15a. As the Ninth Circuit held in *Egan*, the existence of such a statutory right is irrelevant under *McNally*.

The decision below also conflicts with post-*McNally* cases from other Circuits rejecting the argument of the United States that concealing information of value to the government—such as the information Porcelli failed to disclose concerning his true tax liability—can constitute depriving the government of money or property. In *United States* v. *Slay*, for example, the Eighth Circuit reversed the mail fraud convictions of defendants who had obtained a cable television franchise through bribery and false applications. The government argued that the " 'property' of which defendants defrauded the City was not the cable television franchise, but the information concerning the ownership and control interests behind [the] bid for the franchise." 858 F.2d at 1316. The Eighth Circuit rejected the argument. It held that concealing the true information did not deprive the City of its property, just as "the defendants' failure to disclose their ownership interests to persons in state government did not support a conviction in *McNally*." 858 F.2d at 1317. So too here Porcelli's concealment of information about his true tax liability by filing false returns did not take from New York any money or property belonging to it.

Other Circuits follow the same approach as the Eighth Circuit in *Slay*. *See, e.g.*, *United States* v. *Murphy*, 836 F.2d 248, 254 (6th Cir.) (State's "right to accurate information with respect to issuance of bingo permits" not a property interest under *McNally*), *cert. denied*, 109 S.Ct. 307 (1988); *United States* v. *Dadanian*, 856 F.2d 1391, 1392 (9th Cir. 1988), *rev'g on reh.* 818 F.2d 1443 (9th Cir. 1987) (providing false information to obtain gam-

bling license did not implicate government's "interests as a property-holder" under *McNally*). These cases recognize—as the majority below did not—that providing false information cannot constitute depriving another of its property, even if the victim is entitled by law to accurate information.

The majority's analysis below may gain some support from post-*McNally* cases adopting the so-called "constructive trust" theory. Under this approach, a state official or private employee accepting a bribe is viewed under principles of agency as accepting the money on behalf of his principal, the State or private employer. The money is therefore constructively the principal's, and the official or employee by failing to disclose the bribe deprives the principal of *its* money, allegedly bringing the case within the strictures of *McNally*. *See, e.g., United States* v. *Runnels*, 833 F.2d 1183 (6th Cir. 1987) (state official), *vacated and reh. en banc granted*, 842 F.2d 909, 912 (1988); *United States* v. *Fagan*, 821 F.2d 1002, 1010-11 & n.6 (5th Cir. 1987) (private employee), *cert. denied*, 108 S. Ct. 697 (1988).[9] This approach has been squarely rejected by the First,[10] Third,[11]

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[9] This theory derives from the suggestion in footnote ten of Justice Stevens's *McNally* dissent. 107 S.Ct. at 2890 n.10. As noted, the *McNally* majority rejected the suggestion. *See supra* at 8.

[10] *See United States* v. *Ochs*, 842 F.2d at 525, 526 ("such an expansive view of property protected by the mail fraud statute is irreconcilable with the basic holding of *McNally*;" Sixth Circuit's "analysis is confused"). The First Circuit reached this conclusion even though it was "aware of the established rule that a principal *may* institute a lawsuit to claim the illicit profits of an agent or fiduciary," reasoning that "such an abstract property loss is not enough to support a conviction." *Id.* (emphasis in original). The majority below, in contrast, relied on New York's right to institute a lawsuit to collect the taxes Porcelli owed in sustaining his conviction.

[11] *See United States* v. *Zauber*, 857 F.2d 137, 146 (3d Cir. 1988) ("We too reject [the constructive trust theory] as inconsistent with *McNally*"), *cert. denied*, 109 S. Ct. 1340 (1989).

Fourth,[12] Seventh,[13] and Tenth Circuits,[14] and "is in trouble" in the Circuit that spawned it. *United States* v. *Zauber*, 857 F.2d at 146. The majority opinion below not only bucks this clear trend against the constructive trust approach, but takes that approach even further. For Porcelli was in no sense an agent of either the State or an employer, and under this Court's decision in *United States* v. *Johnston*, *supra*, he could not be considered to hold uncollected and unpaid tax dollars "in trust" for the State or anyone else. Other Circuits reject the notion that state officials deprive the State of its property when they accept bribe money which the State could bring an action to recover under agency principles, yet the court below held that Porcelli deprived the State of its property simply because the State was entitled to bring an action to collect the unpaid taxes he owed.

In any event, the novel theory on which the majority below relied to sustain Porcelli's mail fraud convictions was, as Judge Newman emphasized in dissent, "not charged in the indictment, nor presented to the jury." [15] In *McNally*, this Court refused to entertain a new prosecution theory that the defendants had taken money from an insurance agency involved in the scheme, because "there was nothing in the jury charge that required such

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[12] *See United States* v. *Mandel*, 862 F.2d 1067, 1073 (4th Cir. 1988), *pet. for cert. filed*, No. 88-1759 (April 28, 1989).

[13] *See United States* v. *Holzer*, 840 F.2d 1343, 1347 (7th Cir.) ("we find ourselves in respectful disagreement with the Sixth Circuit"), *cert. denied*, 108 S. Ct. 2022 (1988).

[14] *United States* v. *Shelton*, 848 F.2d 1485, 1491-92 (10th Cir. 1988).

[15] App. 33a. The prosecution's theory of the case at trial and on appeal was not that Porcelli deprived New York of a chose in action, but that he had collected the taxes and deprived New York of money. *See, e.g.*, Ct. App. JA at 378-380; Gov't Ct. App. Br. at 51. The court below correctly rejected this theory of the case, ruling that "the Government did not prove actual collection of the tax." App. 13a.

a finding." 107 S. Ct. at 2882. So too here there was no mention whatever in either the indictment or the jury charge of New York's "chose in action," nor any suggestion that the case involved the alleged deprivation or concealment of such a statutory right.[16]

Other Circuits have generally resisted the temptation to salvage mail fraud convictions invalidated by *McNally* by relying on new theories not presented to the jury. *See, e.g., United States* v. *Mandel*, 862 F.2d at 1074 ("Even if the government's theories mentioned just above may be proper subsequent to *McNally*, they are not at issue in this case because the jury was not instructed on them"); *United States* v. *Stack*, 853 F.2d 436, 438 (6th Cir. 1988) ("It might be possible to satisfy the requirements of *McNally* by proof that Gulewicz was defrauded of money, but this theory was not charged or submitted to the jury"); *United States* v. *Italiano*, 837 F.2d 1480, 1486 (11th Cir. 1988) (rejecting new government theory after *McNally* because "it is obvious that the government did not present such facts, pursue this theory when presenting facts to the grand jury, or lead the grand jury ultimately to return its indictment on such a theory").[17] The majority below compounded its error under *McNally* by upholding the conviction on the basis of a theory not presented to the jury, contrary to the holdings of this

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[16] The majority below noted that the indictment and charge required proof that Porcelli "defrauded the State of money due from sales taxes," App. 16a n.2, but the majority relied not on the deprivation of sales taxes to support the conviction—since the taxes owed never became New York's property—but rather on the alleged deprivation of "choses in action." App. 15a-16a. Neither the indictment nor charge made any reference to *that* property interest of the State. *See* App. 33a ("there was nothing in the jury charge that required the jurors to find that Porcelli had deprived New York of its property by concealing a chose in action") (Newman, J., dissenting).

[17] *See generally Chiarella* v. *United States*, 445 U.S. 222, 236 (1980) ("we cannot affirm a criminal conviction on the basis of a theory not presented to the jury").

Court and the approach of the other Circuits in the wake of *McNally*.

It has now been two years since the Court's decision in *McNally*. In that period the United States has pressed upon the various Circuits a wide variety of novel theories in an effort to avoid the clear import of this Court's opinion. The United States has argued that bribed officials actually hold the State's property in trust, that *McNally* somehow does not apply when a state statute is violated, and that information concealed by the defendant is actually property being taken from the victim. Most Circuits have rejected these "ingenious" efforts,[18] recognizing that while "old habits die hard," courts are not free to "recharacterize" the conduct at issue and "let in through the back door the very prosecution theory that the Supreme Court tossed out the front." *United States* v. *Ochs*, 842 F.2d at 527. The majority below, however, did just that. It recognized that the conviction could not be sustained under *McNally* as a deprivation of tax revenue, and so recast the case as a deprivation of a chose in action—a theory on which the jury was never charged.

The decision below is in no sense fact-bound, and has significance far beyond the facts of this particular case. New York is of course hardly unique in possessing a right of action to collect unpaid taxes; *every* State enjoys such authority.[19] If the decision below is permitted to stand, every case of underpaid state taxes in which the state returns are sent through the mail would become not simply a matter of state concern, but a federal criminal mail fraud case. *McNally* makes clear that Congress

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[18] *United States* v. *Slay*, 858 F.2d at 1316.

[19] Indeed, the government argued below that such a chose in action was an inherent attribute of state sovereignty. *See* Supp. Br. at 5 (" 'A tax is an exaction by the sovereign, and necessarily the sovereign has an enforceable claim against every one within the taxable class for the amount lawfully due from him' ") (quoting *Bull* v. *United States*, 295 U.S. 247, 259 (1935)).

intended no such result when it enacted the mail fraud statute. The decision below flouts this Court's opinion in *McNally* and conflicts with decisions from other Courts of Appeals applying *McNally*.

The government itself stated below—perhaps somewhat wishfully—that "what is meant by a property right actionable under the mail fraud statute remains to be fully clarified."[20] Other Courts of Appeals have also recognized that further guidance from this Court is necessary. *See, e.g., United States* v. *Baldinger*, 838 F.2d 176, 179 (6th Cir. 1988). The split decision below provides an excellent opportunity for this Court to reaffirm its holding in *McNally*. Permitting the decision below to stand would constitute an open invitation to prosecutors to continue their efforts to "strain to uphold" convictions that are plainly invalid under *McNally*, App. 34a (Newman, J., dissenting), and to bring new prosecutions that Congress did not intend to be covered by the mail fraud statute. This Court should not sanction such results.[21]

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[20] Supp. Br. at 4.

[21] The Solicitor General has opposed several recent petitions for certiorari presenting *McNally* questions by arguing that enactment of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603 (Nov. 18, 1988), reduces the prospective importance of *McNally* issues. *See, e.g.*, Br. in Opp., *Asher* v. *United States*, No. 88-532, at 7. That statute specifies that "scheme or artifice to defraud" in the federal fraud statutes now "includes a scheme or artifice to deprive another of the intangible right of honest services." Whatever the validity of the argument in other cases, it has no application here. Porcelli was not a state official, nor did his conduct deprive anyone of a right to his "honest services." Section 7603 only overturned that aspect of *McNally* holding that the mail fraud statute did not cover the intangible right to honest services; it does not address the aspect at issue here, the continuing requirement in all cases not involving a fiduciary relationship that the defendant deprive the victim of money or property. *See* App. 29a ("*McNally*'s second holding, concerning the intangible right to honest government, is not implicated by Porcelli's appeal. But the first holding, requiring a deprivation of another's money or property, squarely applies") (Newman, J., dissenting).

II. This Court Should Grant The Writ To Resolve The Direct Conflict With The Sixth Circuit Over Whether RICO Can Be Used To Collect State Taxes

The criminal RICO charge in the superseding indictment was "double boot-strapped" into the case. Although the failure to remit taxes due was not treated as criminal under New York law at the time of Porcelli's conduct, the federal government alleged that that same activity constituted the federal crime of mail fraud, because the underlying state tax returns were sent through the mail. The federal government then invoked the mail fraud as the necessary predicate for the criminal RICO charge. If the mail fraud charges against Porcelli fall—as we submit they must—then the one RICO count falls with them.

There are, however, additional reasons why the RICO conviction cannot stand.

In *Michigan Dept. of Treasury* v. *Fawaz*, 848 F.2d 194 (6th Cir. 1988) (unpublished but reported at 8 RICO L. Rep. 160 (1988)),[22] the Sixth Circuit affirmed a dismissal of a civil RICO suit by the State of Michigan against a gas station operator for repeatedly mailing state tax returns that underreported his sales tax liability—the same conduct found in this case. The Sixth Circuit recognized that under this Court's decision in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), RICO was to be liberally construed, much as the court below relied upon the "extraordinarily broad sweep of RICO." App. 3a. The Sixth Circuit nonetheless concluded that Congress did not intend "to designate the district courts as collection agencies for unpaid state taxes." 8 RICO L. Rep. at 161.

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[22] The fact that this opinion was not intended for publication is irrelevant. *See C.I.R.* v. *McCoy*, 108 S. Ct. 217, 219 (1987).

As the Sixth Circuit noted:

> Fawaz repeatedly cheated on the sales taxes he owed the State of Michigan. The state's attorney general argues that Fawaz's conduct can be dissected and shoehorned into the Act's component definitions so that, when reconstituted, his conduct amounts to racketeering activity and RICO applies. * * * [But this] would violate the clear intent of Congress. [*Id.*]

In *Fawaz*, the State itself, not the federal government, was suing to protect its own interests; the failure to pay the state taxes was clearly a state crime; and the State was proceeding civilly. The Sixth Circuit nevertheless held that the connection with what Congress intended under RICO was too tenuous. Here, the federal government brought a *criminal* RICO case for a failure to pay state taxes when that failure was *not* criminal under state law, and thus the connection to what Congress intended by RICO is even more tenuous.

The Sixth Circuit in *Fawaz* rejected the effort to use RICO to expand the remedies available under state law to collect state taxes, noting that "[i]f the attorney general wishes to avail himself of a civil remedy not now prescribed by state law when collecting unpaid state taxes, his desire should be brought to the attention [of] Michigan's legislature." *Id.* In this case, in contrast, the court below permitted criminal RICO to be used to collect the taxes Porcelli owed New York, even though state officials could only proceed civilly under New York law. If the decision below is upheld, state officials would be foolish to rely on state remedies to collect unpaid state taxes, when they can readily bring a civil RICO action in federal court and obtain not only the unpaid taxes but treble damages and attorney's fees as well, or—as here—have federal prosecutors bring a criminal RICO action and secure the taxes for the State through RICO's draconian forfeiture provisions.

The Sixth Circuit in *Fawaz* expressly noted that it was "not persuaded to adopt the reasoning" of the Seventh Circuit in *Illinois Dept. of Revenue* v. *Phillips*, 771 F.2d 312 (7th Cir. 1985). That case also involved underpayment of state taxes by a gasoline retailer, and a civil RICO action by the State for treble damages. The District Court ruled that "'RICO should not become a vehicle for federal jurisdiction and treble damages in state sales tax fraud cases.'" *Id.* at 316 (quoting District Court opinion). The Seventh Circuit, noting that it had "doubts about the application of RICO" to such a case and that "[p]rinciples of comity might suggest that the federal courts are not the proper place to pursue state tax collection claims," nonetheless "reluctantly" reversed. *Id.* at 316, 317. It stated that "[p]erhaps we can take solace in the fact that the Illinois Department of Revenue promised in oral argument that such tax collection cases will be few, but we doubt, once the cause of action is established, that this will be true." *Id.* at 317. As the subsequent conflicting decisions of the Sixth Circuit in *Fawaz* and the Second Circuit in this case demonstrate, the Seventh Circuit's forebodings were well grounded. If the decision below is permitted to stand, other States can soon be expected to join New York, Illinois, and Michigan in the effort to use RICO to collect state taxes. This Court should grant the writ to resolve the conflict over whether Congress intended such actions when it enacted RICO.

The effort to "shoehorn" state tax evasion into RICO not surprisingly creates tension with the purpose underlying RICO, and the decision below conflicts with decisions from other Circuits on key RICO elements. For example, in *Ornest* v. *Delaware North Companies, Inc.*, 818 F.2d 651 (8th Cir. 1987), the defendant companies allegedly used the mails to defraud plaintiffs by falsely omitting vending machine sales from reports to avoid paying commissions on these sales as required by con-

cession agreements. The false reports were regularly sent by mail over an entire eight-year period. The Court of Appeals nonetheless affirmed a dismissal of the RICO complaint because

> [t]he complaint here alleges nothing more than a single fraudulent scheme over the course of eight years to defraud plaintiffs (and their predecessors) of their contractual share of vending machine sales commissions. There was no allegation that defendants had engaged in similar activities in the past or that they were engaged in other criminal activities elsewhere. [*Id.* at 652.[23]]

If the allegations in *Ornest* were insufficient to state a civil RICO complaint, they necessarily fail to meet the more exacting standards of a criminal charge. The mailings in *Ornest* were as fraudulent as, and occurred over a longer period than, the mailings here. Like the plaintiffs in *Ornest*, the government in this case did not allege—because it could not—that petitioner had misreported sales taxes on other occasions in the past, or that he was engaged in any other criminal activities elsewhere. The two decisions cannot be reconciled.

In *Delta Truck & Tractor, Inc.* v. *J.I. Case Co.*, 855 F.2d 241 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1531 (1989), the plaintiff alleged that three defendants, acting together, committed numerous acts of wire and mail fraud during the course of a merger and the elimination of duplicative dealers. The Fifth Circuit affirmed a dismissal of the RICO charge because the multiple frauds were "part and parcel of a single, discrete and otherwise lawful commercial transaction," and the defendants were not "a continuous threat as RICO persons." *Id.* at 244. The plaintiff had "alleged as a pattern of racket-

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[23] *See, e.g., Terre Du Lac Ass'n* v. *Terre Du Lac, Inc.*, 834 F.2d 148, 150 (8th Cir. 1987) (RICO prerequisites not met because "alleged predicate acts of mail fraud constitute parts of a single allegedly fraudulent scheme").

eering activity nothing more than numerous predicate acts which were necessary segments of an otherwise legitimate and singular commercial endeavor." *Id.*

This reasoning, again, simply will not square with that of the court below. Porcelli's operation of the gasoline stations and all his other commercial activities were perfectly legitimate, and the only crimes alleged as predicates for RICO were the mailings of the state tax returns, "part and parcel" and "necessary segments" of that activity.

To cite another example, the court in *Bosteve, Ltd.* v. *Marauszwski*, 642 F. Supp. 197 (E.D.N.Y. 1986), noted that "[t]he underlying predicate acts proved at trial concerned a single scheme to defraud the New York State Department of Taxation and Finance by incorporating [one of the plaintiffs] out of state prior to the purchase of the boat in order to evade the payment of New York sales tax on the boat." *Id.* at 201. "This isolated tax evasion scheme cannot establish a pattern of racketeering activity." *Id.* Thus, despite the fact that mail fraud was both charged and proven, *id.* at 198-199, 203, and with full recognition of this Court's decision in *Sedima*, *id.* at 199-201, the RICO count was thrown out. *Id.* at 203.

Commentators have already noted the extent to which parties, including prosecutors, have stretched RICO to its outer limits and beyond, and the resulting confusion in the courts.[24] But if the opinion below is allowed to stand,

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[24] *E.g.*, Goldsmith, *RICO and "Pattern:" The Search for "Continuity Plus Relationship,"* 73 Cornell L. Rev. 971, 1003 (1988); Lynch, *RICO: The Crime of Being a Criminal*, 87 Colum. L. Rev. 661, 752, 763 (1987); Lynch, *A Reply to Michael Goldsmith*, 88 Colum. L. Rev. 802, 804 (1988); Note, *Criminal RICO Forfeitures and the Eighth Amendment: "Rough" Justice Is Not Enough*, 14 Hastings Const. L.Q. 451 (1987); Note, *Criminal RICO: Forfeiture of Fees, Sixth Amendment Rights, and Attorney Responsibilities*, 21 U. Rich. L. Rev. 589 (1987); Owles, *"Extraordinary,*

RICO will become a tool of the federal government, or of the States and the federal government acting in concert, to reach activities and to impose sanctions—including forfeiture of all property involved—never foreseen or approved by Congress or the courts.

In virtually all of the cases to date, prosecutors have charged an underlying illegal activity quite apart from using the mails to underreport taxes. Where taxes were involved, the RICO crimes generated the income on which the defendants failed to report or pay taxes. An example is *United States* v. *Oakey*, 853 F.2d 551 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 846 (1989), where an attorney bribed court personnel to steer unrepresented defendants to him, obtained the defendants' cash bond refund checks, and then did not pay taxes on these funds. *Id.* at 554. Because the income he failed to report was directly connected with his RICO activity, the tax and RICO charges could be tried together.[25]

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if Not Outrageous," 136 New L.J. 244 (March 14, 1985); Tarlow, *Someone Loaded the Dice (A Response to RICO: Evening Up the Odds)*, Trial (Feb. 1981), at 54; Note, *The Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in its Application and a Proposal for Reform*, 33 Vand. L. Rev. 441, 477, 480 (1980). *See also H.J. Inc.* v. *Northwestern Bell Tel. Co.*, *cert. granted*, 108 S. Ct. 1219 (1988) (case presenting conflict among Circuits under RICO).

[25] *See also United States* v. *Casamayor*, 837 F.2d 1509, 1511-12 (11th Cir. 1988) (unreported income from narcotics bribes), *cert. denied*, 109 S. Ct. 813 (1989); *United States* v. *Anderson*, 809 F.2d 1281, 1288-89 (7th Cir. 1987) (unreported income from bribes); *United States* v. *Ianniello*, 808 F.2d 184, 186 (2d Cir. 1986) (concealment of financial interests to obtain liquor licenses resulted in skimming and tax evasion), *cert. denied*, 107 S. Ct. 3230 (1987); *United States* v. *Kenny*, 645 F.2d 1323, 1344 (9th Cir.) (unreported income from illicit contracting activities), *cert. denied*, 452 U.S. 920 (1981). Where RICO or mail fraud charges have been sufficiently distinct from tax evasion charges, the tax counts have frequently been severed. *See, e.g., United States* v. *Weinstein*, 762 F.2d 1522, 1536 & n.11 (11th Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986).

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 813, 814—August Term, 1987

(Argued February 29, 1988 Decided Jan. 11, 1989)

Docket Nos. 87-1440, -1451

UNITED STATES OF AMERICA,
Appellee,

v.

OSCAR PORCELLI,
Appellant.

Before OAKES and NEWMAN, *Circuit Judges*, and KEENAN, *District Judge.**

Appeal from a judgment of conviction and forfeiture entered in the United States District Court for the Eastern District of New York (Charles P. Sifton, *Judge*) for mail fraud and racketeering relating to the failure to pay state sales taxes.

Affirmed in part and reversed in part; remanded in part. Judge Newman dissents in a separate opinion.

Vivian Shevitz, New York, NY (Jane Simkin Smith, Steven A. Rosen, of counsel), *for Appellant.*

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* Of the United States District Court for the Southern District of New York, sitting by designation.

Steven Gold, Assistant United States Attorney (Andrew J. Maloney, United States Attorney for the Eastern District of New York, Emily Berger, Assistant United States Attorney, of counsel), *for Appellee.*

OAKES, *Circuit Judge*:

Oscar Porcelli appeals a conviction on sixty-one counts of mail fraud, 18 U.S.C. § 1341 (1982), and one count of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) (1982). These acts all relate to the filing of a series of—some one hundred—fraudulent New York State sales tax returns with respect to sales at twelve retail gasoline stations owned in whole or in part by Porcelli or one of his corporations. After a jury trial before Charles P. Sifton, Judge, in the United States District Court for the Eastern District of New York, resulting in the convictions, the jury also returned a verdict of forfeiture of $4,755,000 representing the unpaid sales taxes as well as of thirty-four of Porcelli's corporations to the United States. Porcelli was sentenced to concurrent two-year terms on each of the sixty-two counts, with the execution of all but six months suspended, and was placed on probation for a period of five years. He was ordered to make restitution to the State of New York in the amount of $4,755,000 less any sums collected by the State pursuant to the judgment of forfeiture in this case or any civil tax proceeding. Following the forfeiture verdict, Judge Sifton entered a judgment of forfeiture which directs that Porcelli forfeit the sum of $4,755,000 and his interest in thirty-four corporations to the United States. The moneys or proceeds from the properties seized are to be paid to the State of New York up to the amount of all unpaid sales taxes, interest, and civil penalties and then to the United States up to an amount equal to twice the amount of sales tax and interest paid to the State of New York.

Judge Sifton also denied Porcelli's motion for a new trial on grounds of ineffective assistance of counsel.

On appeal Porcelli argues that use of the mail fraud statute violated due process, that proof of mail fraud was legally insufficient in terms of proof as to specific criminal intent and in terms of proof as to "mailings"; that the mail fraud statute does not encompass tax violations; that the Government's use of RICO to prosecute Porcelli for state sales tax underpayments violates the intent of Congress; that the RICO conviction should be reversed because there was no evidence that the enterprise charged in the indictment was conducted through racketeering activity; that the forfeitures are supported by insufficient evidence and are tainted by erroneous instructions and ambiguous special interrogatories to the jury; that the forfeitures should be reversed because they are cruel, unusual, and grossly disproportionate to the misdeeds of the retail gasoline companies involved; and that appellant was denied the effective assistance of counsel.

We think that the prosecution of a state sales tax evader for a RICO violation pushes that law to its outer limits, especially when that tax evasion was not made criminal by the state itself at the time that the fraudulent returns were filed. We nevertheless affirm the convisions (except for six counts involving only the mailing of blank forms by the State *to* Porcelli's companies) by virtue of the extraordinarily broad sweep of RICO and of the federal mail fraud statute and despite *McNally v. United States*, 55 U.S.L.W. 5011 (U.S. June 24, 1987). We believe, however, following *United States v. Horak*, 833 F.2d 1235 (7th Cir. 1987), that the forfeitures were overly broad because they included corporations as to which the Government did not prove any direct receipts from the fraudulent gas station corporations, and we think that the trial judge must reconsider the defendant's claim that the forfeitures were disproportionate.

We do not think that Porcelli satisfies either prong of the test of ineffective counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Therefore we affirm the convictions and the denial of a new trial, but we reverse the order relating to forfeiture and remand for further findings.

FACTS

Viewing the evidence most favorably to the Government, twelve of defendant's retail gasoline stations filed false sales tax returns between 1978 and 1982, enabling them to omit to pay approximately $4,755,000 in state sales tax. This represented two-thirds of the $6.7 million in taxes the stations owed on sales during that period.

Porcelli first entered the retail gasoline business in 1973 in partnership with one Jimmy Garcias Sorentino. From then to 1979, the two men purchased and operated a chain of retail service stations which by 1979 had grown to fourteen in number. As of June 1, 1979, they terminated their partnership and each continued to operate seven of the stations. Each retail gasoline station was organized as a separate corporation, and we will call them the operating corporations. The real estate underlying each station was separately held by what we will call the realty corporations. Porcelli formed a new management company, Ditmas Oil Associates, Inc. ("Ditmas"). Ditmas was the parent company of the group. It had a gasoline terminal which was used to supply gasoline to the various retail outlets. Porcelli also formed a trucking company called Chamber Transport, which made deliveries from the Ditmas terminal to the various retail stations, and a security company known as MK Armored Services, which picked up the sales proceeds at the retail stations and brought them to Porcelli's central money room at Ditmas.

In 1982 Porcelli consolidated his holdings, which had increased to seventeen, into two corporations, Gaseteria

Oil Corporation, Inc., and Bosbay Service Center, Inc., and ultimately into the one, Gaseteria.

There was testimony, which is supported by New York statutory authority, that retailers must register with the State and obtain a certificate of authority to collect sales taxes, and that the State mails blank sales tax returns to all regisered retailers at the beginning of every sales tax quarter. The returns, setting forth the total dollar amount of quarterly sales and the sales taxes due on that amount, are required to be filed by Article 29 of the New York Tax Law (McKinney 1987).

We will return to the New York sales tax law as it pertains to petroleum products in our discussion of *McNally v. United States*. Suffice it to say here that Count One of the indictment lists 143 racketeering acts, numbered 1(a) through 26(h). Some of the racketeering acts involve two mailings—one of a blank return by the State to one of Porcelli's corporations and the second of a fraudulently completed return by a Porcelli corporation to the State. A number of racketeering acts charged relate only to the second type of mailing, and six acts charged cover only the first. The parties stipulated that each of the 143 sales tax returns was mailed as described in the indictment.

A state sales tax auditor, James McGill, audited the tax returns listed in the indictment. He obtained sales data from Porcelli's suppliers reflecting the dollar value of the gasoline they provided to Porcelli's terminal or retail stations and compared that data to the sales declared by Porcelli on the tax returns. In making this comparison, McGill assumed that Porcelli sold gasoline at the same price he paid for it, thus realizing no profits at all. The parties stipulated that the gas stations did in fact sell all gasoline at a price equal to or greater than that at which it was purchased.

McGill's audit determined that during the last year of Porcelli's partnership with Garcia his corporations reported approximately $3,580,000 in sales, or only 26% of their true sales for the year. This resulted in an underpayment of sales taxes due the State of New York of some $798,000. During the three and half years following the termination of the partnership with Garcia, i.e., from June of 1979 through 1982, Porcelli's businesses had sales of $69,600,000 but reported only $20,330,000, thereby underpaying taxes due New York State by about $3,957,000. Thus the total amount of Porcelli's underpayments was the $4,755,000 previously stated.

At trial Porcelli's accountant, Murray Katz, who prepared most of the tax returns, made it clear that he did so with Porcelli's knowledge and at his urging. He related the conversation he had with Porcelli in 1979 when he realized that the oil companies supplying Porcelli generated printed summaries of their sales which, if revealed to the State tax authorities, would reveal the Porcelli operating companies' fraud. Porcelli told Katz not to worry because the State tax authorities would never obtain supplier records and compare them to his companies' returns. After Porcelli and Garcia split up, Porcelli and Katz discussed consolidating the Porcelli holdings into one corporation. They decided against doing so because they believed that a single sales tax return for all of the gas stations was more likely to be audited than individual returns filed for each station. In September 1979, Katz attempted to prepare, he testified, an accurate set of sales tax returns; when Porcelli saw the figures he told Katz that it would be impossible for him to stay in business and grow without understating his sales tax liabilities.

While Katz was working for Porcelli, Mobil Oil sued three of the operating companies and sought copies of their sales tax returns in civil discovery. Porcelli directed Katz to prepare a set of dummy tax returns set-

ting forth the true sales volume of the operating companies, and Katz did so. The dummy returns showed substantially greater sales than the amounts shown on the returns actually filed.

There was further evidence of Porcelli's involvement in the tax fraud: He received daily sales reports concerning each station, he set the prices charged for gasoline, and he had monthly summaries of sales in gallons and dollars which were kept in his office, as well as weekly statements of cash balances in corporate bank accounts. He had previously admitted that he had total control over his business, "purchasing, selling, decision making, building, firing, hiring, everything," claiming that he did not delegate authority to, or share decision-making responsibilities with, anyone. When the State started an audit of one of Porcelli's retail stations, "Gasaver," Porcelli, according to Katz, insisted on preparing its returns himself and did so.

By January of 1982, Porcelli had received notices from state authorities that he owed millions of dollars in back sales taxes plus interest and penalties, but he continued to employ and rely upon Katz. Indeed, according to Katz, Porcelli offered him a $200,000 bribe to plead guilty to filing false returns, accept sole responsibility for the sales tax frauds, and falsely exculpate Porcelli. We will discuss further evidence pertaining to Porcelli's RICO enterprise under that topic.

DISCUSSION

A. Due Process

Porcelli's first argument is that because the State of New York itself did not punish criminally the failure of a vendor to pay over to the State sales taxes collected from a customer, use of the federal mail fraud statute to do so violated due process of the law. Porcelli is correct as far as New York law is concerned. In *People v.*

Valenza, 60 N.Y.2d 363, 457 N.E.2d 748, 469 N.Y.S.2d 642 (1983), the Court of Appeals examined the structure of the "[p]enalties and interest" provision, section 1145, of the Tax Law. Certain violations were subject to both criminal and civil penalties, while others, including the failure to remit sales taxes, were subject to civil penalties only (with one small exception not relevant here). The court therefore held that "the failure to pay over sales taxes may not be considered criminal conduct and is subject to civil penalties only." 60 N.Y.2d at 370, 457 N.E.2d at 750, 469 N.Y.S.2d at 645.

The overall argument that Porcelli had no notice that his conduct was illegal is nevertheless unavailing in light of *United States v. DeFiore*, 720 F.2d 757 (2d Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984). The defendant there argued that the wire fraud statute should not apply to schemes to defraud the state governments of taxes due. This court followed four other circuits that had squarely applied the federal fraud statutes to state tax law violations. We held that the federal wire fraud statute was applicable to a scheme to defraud the State of New York of cigarette taxes. The court said that the focus of the wire fraud statute "is upon the misuse of the wires, not the regulation of state affairs. . . . In short, principles of federalism do not provide a basis for reversal." *Id.* at 761-62 (citations omitted). In so holding, the court distinguished Judge Weinfeld's decision in *United States v. Henderson*, 386 F. Supp. 1048, 1052 (S.D.N.Y. 1974), which held that Congress did not intend to apply the mail fraud statute to a scheme to defraud the United States by evading the payment of taxes. *DeFiore* distinguished *Henderson* as involving a federal income tax fraud prosecution and also cited *United States v. Miller*, 545 F.2d 1204, 1216 n.17 (9th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977), which rejected *Henderson* in the context of a federal tax violation. *DeFiore*, 720 F.2d at 761.

To be sure, neither *DeFiore* nor the cases from the other circuits, *United States v. Melvin*, 544 F.2d 767 (5th Cir.), *cert denied*, 430 U.S. 910 (1977); *United States v. Brewer*, 528 F.2d 492 (4th Cir. 1975); *United States v. Mirabile*, 503 F.2d 1065 (8th Cir. 1974), *cert. denied*, 420 U.S. 973 (1975); and *United States v. Flaxman*, 495 F.2d 344 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974), considered the argument that a state's failure to make underpayment of taxes criminal should bar federal prosecution. That does not mean, however, that the broad federal mail fraud statute does not apply, since it punishes "any scheme or artifice to defraud" in which the jurisdictional means—the mails—are employed.

Porcelli casts his due process argument in a slightly different way, focusing on the mental element of the offense. He begins with the rule of lenity, that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Liparota v. United States*, 471 U.S. 419, 427 (1985) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). Porcelli refers us to *James v. United States*, 366 U.S. 213, 221-22 (1961), in which the Court reversed a tax evasion conviction for lack of proof of willfulness because the defendant's conduct, according to the contemporaneous judicial gloss, had been proper when it occurred. The argument is that given the "gloss" of the New York sales tax law during the indictment period, Porcelli could not, "in legal contemplation, have formed the intent necessary to commit" fraud. *Kahr v. Commissioner*, 414 F.2d 621, 627 (2d Cir. 1969); *see also United States v. Dixon*, 536 F.2d 1388, 1401 (2d Cir. 1976) (mail fraud requires specific intent). He also interprets his comments to Katz, that in effect the underpayment was a "loan" from the State, as meaning that he could not have thereby had the specific intent.

The specific intent required under the mail fraud statute is the intent to defraud, *e.g.*, *United States v.*

Rodolitz, 786 F.2d 77, 80-81 (2d Cir.), *cert. denied*, 479 U.S. 826 (1986), and not the intent to violate a statute. Porcelli intended to defraud the State. We read Katz's testimony as showing that Porcelli knew full well that he was not simply "borrowing" money from the State. Accordingly, we reject this due process claim.

B. Mailings by the State

Six of the sixty-one counts of mail fraud charged only a mailing of a blank sales tax return from New York State to Porcelli, without the return mailing of a fraudulent return. Porcelli argues that these mailings by the State were not in furtherance of his so-called fraudulent scheme and that those six counts somehow tainted his entire trial. We agree with the first argument, but not with the second. True, this court has gone quite far in holding that routine mailings are sufficient to form the basis for mail fraud convictions. *E.g.*, *United States v. Muni*, 668 F.2d 87, 90 (2d Cir. 1981); *United States v. Reed*, 639 F.2d 896, 906 (2d Cir. 1981). Under *Pereira v. United States*, 347 U.S. 1, 8 (1954), use of the mails need not be an essential element of the scheme; rather, mailings are in furtherance of a fraudulent scheme if they are "incident to an essential part of the scheme." *Cf. United States v. Maze*, 414 U.S. 395 (1974) (finding use of mails not sufficiently closely related to respondent's scheme to support mail fraud conviction).

The use of forms mailed by the State was a necessary part of Porcelli's scheme. However, the mailing of a form by the State, and nothing more, is not sufficiently closely related to his scheme to support a separate mail fraud count. *United States v. Freitag*, 768 F.2d 240 (8th Cir. 1985), and *United States v. Bosby*, 675 F.2d 1174 (11th Cir. 1982), are distinguishable in that they involved personalized checks that the defendants caused to be mailed and that were essential to their schemes.

Thus we reverse as to mail fraud counts 2, 13, 18, 24, 40, and 51 corresponding to Racketeering Acts 15(f), 16(f), 18(f), 19(f), 21(f), and 24(d).

These reversals do not disturb Porcelli's other convictions. It was not prejudicial to include the mailings by the State in the other counts where there were returned fraudulent mailings. We perceive no prejudicial spillover from the inclusion of the six racketeering acts as to which we reverse or from those mail fraud counts themselves. *See United States v. Cody*, 722 F.2d 1052, 1060-61 (2d Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984); *United States v. Ivic*, 700 F.2d 51, 65 (2d Cir. 1983).

C. *McNally*

Porcelli's next argument is more persuasive. He asserts that the Supreme Court in *McNally v. United States*, 55 U.S.L.W. 5011 (U.S. June 24, 1987), indicated that Congress did not intend the mail fraud statute to apply to the tax violations here. *McNally*, it will be recalled, held that the mail fraud statute, 18 U.S.C. § 1341 (1982), is limited to the protection of property rights and that the citizen's right to honest government is not such a property right. It follows, then, that the statute proects only a state's interest as "property-holder." 55 U.S.L.W. at 5014 n.8. Moreover, the Court said that "if state law expressly permitted or did not forbid [the conduct] it would take a much clearer indication than the mail fraud statute evidences to convince us that [the conduct] defraud the State and is forbidden under federal law." *Id.* at 5015 n.9. The argument achieves an even greater level of sophistication when one recalls the words of *McNally*:

> As the Court long ago stated, however, the words "to defraud" commonly refer to "wrongdoing one in his property rights by dishonest methods or "schemes" and "usually signify the *deprivation* of

> something of value by trick, deceit, chicane, or overreaching."

55 U.S.L.W. at 5014 (emphasis added) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). The concept of deprivation means obtaining property with an intent not to pay as opposed to mere failure to pay. The question then becomes whether Porcelli intended to deprive New York of its property.

Intangible interests have long been recognized and protected as property. *E.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (trade secrets); *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (long term lease). Any suggestion that *McNally* might exclude all intangible interests from the scope of section 1341 (or its wire fraud companion, section 1343) was dispelled by *Carpenter v. United States*, 56 U.S.L.W. 4007 (U.S. Nov. 16, 1987) (holding that confidential business information is "property" protected by the mail and wire fraud statutes). Thus the fact that New York's interest in unpaid sales taxes is intangible is no obstacle to a mail fraud prosecution. In fact, Porcelli, as he knew he was doing, obtained cash, and this is true whether or not he actually collected the sales tax on his gasoline sales. If he did not collect the tax, then he obtained funds that an honest retailer, selling for the same price, would have remitted to the State. If he did collect the tax (as would have been proven if there had been evidence that it was posted on signs) but failed to remit, then, of course, he obtained money and surely deprived the State. In any event, New York State lost money as a result of Porcelli's schemes, that is to say, lost the sales tax proceeds due from his sales of gasoline even though it maintains a civil right, or chose in action, to obtain those proceeds.[1]

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[1] The dissent characterizes Porcelli's behavior in purely negative terms: He failed to collect the sales taxes, and then he simply

Under *McNally*, then, Porcelli gained something tangible and New York State's interests as a property holder were implicated. But did Porcelli *deprive* New York of its property? The answer to this question would be easy if Porcelli actually collected the tax on his sales. *See* N.Y. Tax Law § 1132(a) (McKinney 1987) ("tax shall be paid to the person required to collect it as trustee for and on account of the state"). However, the Government did not prove actual collection of the tax. We turn to New York law to determine whether a vendor's failure both to collect and to remit sales taxes deprives the State of its property.

One derives from the New York case law that sales taxes are just that—a tax obligation—and not ordinary debt. The case law also indicates that the statutory provisions for proceedings to recover unpaid sales taxes define the State's property interest here as choses in action. In *In re Rockaway Paint Centre, Inc.*, 249 A.D. 66, 291 N.Y.S. 341 (1936), the court in reference to the New York City sales tax there involved said that "the tax is imposed not on the vendor or the purchaser, but 'upon receipt from sales.'" 249 A.D. at 68, 291 N.Y.S. at 344 (quoting local tax law). Here also the sales tax is imposed upon "[t]he receipts from every retail sale of tangible personal property." N.Y. Tax Law § 1105 (a) (McKinney 1987). The *Rockaway* court went on to say:

> True, the obligation to pay the tax is placed in the first instance upon the purchaser, but a concurrent obligation is placed upon the vendor to collect it,

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failed to pay a debt. We see more than just omissions to act in this case. There is a pattern of action stretching over a considerable period of time. Porcelli systematically underpaid his sales taxes and concealed what he was doing. A vendor may undertake to defraud the State by failing to collect sales taxes and then pocketing the money that he owes in taxes. This is quite different from "simply . . . failing to pay [a] debt."

> and, whether he does or does not collect it, a direct and independent obligation is cast upon the vendor to pay it to the city. Once the purchaser pays the tax, whether to the vendor or directly to the city, he is discharged from liability. But until the receipt of the tax by the city, the vendor remains liable for it. The fact that in the event of non-payment the city has a right to proceed against the purchaser does not diminish the liability of the vendor or change the character of his obligation from that of a tax to a debt.

249 A.D. at 68-69, 291 N.Y.S. at 344. So, too, did Porcelli have "a direct and independent obligation" to pay the State the sales taxes due, an obligation which by virtue of his fraudulent scheme the State did not even know about.

Further, the New York tax law here involved states that "[e]very person required to collect the tax shall collect the tax from the customer when collecting the price . . . to which it applies. . . . The tax shall be paid to the person required to collect it as trustee for and on account of the state." N.Y. Tax Law § 1132(a) (McKinney 1987). It also provides that the "amount so payable to the tax commission for the period for which a return is required to be filed shall be due and payable to the tax commission on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts . . . or the value of property or services sold or purchased or the taxes due thereon." *Id.* § 1137(e)(1). In reference to the analogous New York City sales tax law which declared that the tax "shall be paid by the purchaser to the vendor as trustee for and on account of the city and the vendor shall be liable for the collection thereof and for the tax," the New York Court of Appeals held that

> [w]hile the incidence of the tax is, in the first instance, placed on the consumer, this court has flatly held that "vendors . . . are to be deemed taxpayers under this legislation," *Fifth Ave. Building Co. v. Joseph*, 297 N.Y. 278, 283, 79 N.E.2d 22, 24, that "the obligation imposed upon the vendor is in the nature of a tax" which is "not measured by the amount collected nor dependent upon failure to exercise the diligence in collection which would be required of an agent." *Matter of Atlas Television Co.*, 273 N.Y. 51, 57-58, 6 N.E.2d 94, 96.

W. T. Grant Co. v. Joseph, 2 N.Y.2d 196, 203, 140 N.E. 2d 244, 247-48, 159 N.Y.S.2d 150, 154 (1957). The *W. T. Grant Co.* court stated that it was a "necessary corollary that one measure of the vendor's obligation as a taxpayer is the tax which his customers were required to pay on individual sales, and that obligation may not be discharged by payment of any lesser amount, irrespective of the vendor's exercise of reasonable diligence in collection." 2 N.Y.2d at 203, 140 N.E.2d at 248, 159 N.Y.S.2d at 154. The court then went on to quote *Merchants Refrigerating Co. v. Taylor*, 275 N.Y. 113, 124, 9 N.E.2d 799, 803 (1937), for the proposition that the vendor is " 'under a duty to pay the tax . . . regardless of whether or not . . . [he] collects it from the purchaser.' " 2 N.Y.2d at 203, 140 N.E.2d at 248, 159 N.Y.S.2d at 154-55.

We do not think that Porcelli was in any different situation vis-a-vis the State here. He was obliged to pay the tax whether or not he collected it from the customers. By virtue of his scheme to defraud, i.e., the false sales tax returns, he was in a very real sense "depriving" the State of its property. The fact that the State has a claim, a chose in action, for the difference between what was paid and the tax shown on the false return may mean that it has not finally been deprived of that

chose in action. However, the fact remains that until the fraud was discovered it had been deprived of its property.

Porcelli's conduct, in short, was aimed at depriving the State of its property, the choses in action represented generally in the state tax law as above stated, and specifically in the state tax law providing for an action at law and authorizing the tax commissioner to issue a warrant and to obtain a lien upon the property of the person failing to pay the tax. N.Y. Tax Law § 1141(a)-(b) (McKinney 1987).[2]

Nothing in *United States v. Holzer*, 840 F.2d 1343 (7th Cir. 1988), is to the contrary. There, Judge Posner's opinion followed *McNally* and distinguished *Carpenter* in reversing the mail fraud conviction of an Illinois state trial judge for taking bribes from lawyers with cases before him or from persons who sought appointment as receivers. Indeed, in dictum Judge Posner advances very much the same proposition we rely upon here: *McNally* would not apply to a corrupt public official who, having received bribes, takes steps to conceal them in order to defeat his public employer's right to obtain them by means of a suit based on constructive trust principles. *See Holzer*, 840 F.2d at 1348.

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[2] This is not, as suggested by the dissent, an alternative theory upon which to uphold Porcelli's conviction. Our analysis shows, first, that New York had a property interest, which we label a chose in action, in Porcelli's tax obligations. We then show that Porcelli deprived New York of that property when he carried out a scheme (in the words of the indictment and the jury charge) "to defraud the State of New York . . . of sales tax due on the retail sale of gasoline by underreporting the gross sales, taxable sales, and sales tax due." Thus, Porcelli's indictment and the charge to his jury remain satisfactory; they required proof that he knowingly and willfully defrauded the State of money due from sales taxes. Proof of that was proof that he intentionally deprived the State of its property, in violation of the mail fraud statute as construed by *McNally*.

D. Enterprise

Porcelli argues that the evidence at trial did not prove the extensive enterprise alleged in the indictment. The failure to satisfy *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), and the material variance between the indictment and the proof require, he claims, a reversal of the RICO conviction.

The "enterprise" is a separate element that must be proven in a RICO action. *United States v. Turkette*, 452 U.S. 576, 583 (1981). The statute defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1982). This broad definition makes sense when applied to uses of the word in subsections 1962(a) and (b). The enterprise can be *any* enterprise, not necessarily one engaged in a pattern of racketeering; indeed, it may be a victim of racketeering. This is consistent with Congress's goal of protecting legitimate businesses from infiltration by organized crime. *See* Lynch, *RICO: The Crime of Being a Criminal*, 87 Colum. L. Rev. 661, 677-80 (1987).

In some situations, however, the "enterprise" is more narrowly defined. The enterprise itself may be the villain, conducting its affairs through a pattern of racketeering. This sort of enterprise falls within the scope of subsection 1962(2). *See Turkette, supra* (term "enterprise" as used in RICO encompasses both legitimate and illegitimate enterprises).

Differences among RICO enterprises are apparent in the case law, although courts do not always articulate the distinction. For example, in *United States v. Zang*, 703 F.2d 1186, 1194 (10th Cir. 1982), *cert. denied*, 464 U.S. 828 (1983), an "ongoing association for the purpose of engaging in interstate commerce" satisfied

RICO's "enterprise" element. The enterprise in this case was a partnership between the two racketeer defendants. However, as the court's treatment of the forfeiture issue demonstrated, the affairs of that enterprise were not conducted through a pattern of racketeering. *See id.* at 1195. In *United States v. McNary*, 620 F.2d 621, 628-29 (7th Cir. 1980), the court upheld a conviction under section 1962(a) where the defendant had invested money obtained through bribery and extortion in a family-owned travel agency, an enterprise engaged in interstate commerce.

In many cases, of course, the enterprise itself is the vehicle for the racketeering activity. For example, in *Huber* an interlocking group of corporations constituted a fraudulent enterprise that supplied hospital and surgical equipment. 603 F.2d at 393-95. In *United States v. Mazzei*, 700 F.2d 85, 91 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983), the enterprise was a group of players and bettors who joined together to influence the outcome of college basketball games in a point-shaving scheme.

These distinctions among RICO enterprises become important in a case of forfeiture under section 1963(a). Courts that hold that a "RICO enterprise" is forfeitable in its entirety refer to enterprises whose affairs are conducted through a pattern of racketeering, in violation of section 1962(c). *E.g.*, *United States v. Walsh*, 700 F.2d 846 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983); *Huber*. The statute also requires the forfeiture of an "interest" outside the racketeering RICO enterprise—e.g., an investment in a legitimate business made with tainted funds or an interest that gives one influence over a racketeering enterprise. 18 U.S.C. § 1963(a)(1), (2)(D), (3) (Supp. IV 1986). *See Russello v. United States*, 464 U.S. 16 (1983) (discussion of section 1963(a)(1)). In these cases, however, it is not the entire enterprise that is forfeited but the property interests in that enterprise that are derived from racketeering activity or that are

a source of influence over a racketeering enterprise. Courts therefore limit forfeitures outside the racketeering enterprise. *E.g.*, *Zang*, 703 F.2d at 1195; *Horak*, 833 F.2d at 1243 (forfeiture under § 1963(a)(1) limited to interests that would not have been acquired or maintained "but for" defendant's racketeering activities); *cf. United States v. McKeithen*, 822 F.2d 310, 314-15 (2d Cir. 1987) (requiring proportional forfeiture of property that is source of influence under Continuing Criminal Enterprise statute, 21 U.S.C. § 848(a)(2), and noting similarity of continuing criminal enterprise statute's forfeiture provision to § 1963(a)(2).

These distinctions should be borne in mind when we refer to the term "enterprise." For clarity here, we refer to a "RICO enterprise" to mean a *racketeering* enterprise within the meaning of section 1962(c). An important issue in this case is the extent of Porcelli's RICO enterprise. There can be no serious dispute that the twelve operating companies were, collectively, a RICO enterprise. But what about the realty companies? What about Ditmas, the management company? What about the trucking and security companies?

The Supreme Court has commented that an enterprise may be "a group of persons associated together for a common purpose of engaging in a course of conduct." The existence of the enterprise may be proven with evidence of an "ongoing organization" in which its associates "function as a continuing unit." *Turkette*, 452 U.S. at 583. *See also United States v. Lemm*, 680 F.2d 1193, 1198 (8th Cir. 1982) (elements of "enterprise" are "common or shared purpose," "continuity of structure and personnel," and "ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering"), *cert. denied*, 459 U.S. 1110 (1983); *GLM Corp. v. Klein*, 665 F. Supp. 283, 289 (S.D.N.Y. 1987) (complaint sufficiently alleged RICO enterprise where it claimed that individuals "functioned as a con-

tinuing group with a common purpose to divert corporate opportunities . . . by improper means").

This court's decision in *Huber* shows the correct approach to defining the RICO enterprise in Porcelli's case. *Huber* involved a multicorporate hospital supply business which had defrauded the United States through Medicare, Medicaid, and Hill-Burton hospital programs. Huber owned seven corporations, all of which were in the business of supplying hospital and surgical supplies, furniture, and equipment. *Id.* at 390-92. The court held that common ownership of the corporation was, in itself, an insufficient association to create a RICO enterprise. *Id.* at 394. However, the evidence showed that transfers of funds among Huber's companies could "represent[] funds derived from the scheme to defraud." Each of the companies was involved in the fraudulent hospital supply operation; they were not "merely unrelated businesses owned by the same person." The court concluded that Huber's seven corporations were "a single business operated under various names and forms chosen by appellant to suit his own purposes and convenience." *Id.* at 395. They were the RICO enterprise that was subject to forfeiture. *Id.* at 390-91.

The *Huber* court distinguished *United States v. Nerone*, 563 F.2d 836 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978), where an illegal gambling operation in one mobile home had "nothing to do with the affairs of the trailer park" where that home was located. *Huber*, 603 F.2d at 395. The court also warned against "undue prosecutorial zeal in invoking RICO." *Id.* at 396. *See also Horak*, 833 F.2d at 1251 ("prosecutorial caprice in the choice of the enterprise" could implicate the Eighth Amendment).

The evidence in Porcelli's case shows the existence of a RICO enterprise extending *beyond* the twelve operating companies that underpaid their sales tax. Those op-

erating companies occupied land that was owned or leased by separate realty companies. Without that real estate, obviously, the operating companies could not have operated. In addition, Ditmas was the keystone in Porcelli's racketeering arch. There was evidence that Ditmas was the parent of the retail gas stations. Porcelli, his accountant, and his management staff had offices at Ditmas where they kept the books and records of the operating companies. Ditmas also operated a wholesale gasoline terminal which supplied the retail stations with gasoline. By channeling all of his wholesale purchases through Ditmas, Porcelli could conceal the volume of sales at individual stations and thus the extent of his underpayment of sales taxes.

We conclude, therefore, that the evidence is sufficient to prove a RICO enterprise consisting of the twelve operating companies that underpaid their sales taxes, the realty companies that owned or leased those operating companies' land and Ditmas Oil Associates, Inc., the management company. It was incorrect, however, to include in the RICO enterprise four other operating companies that were acquired with funds from the twelve operating companies but that did *not* underpay their sales taxes. Those four companies might well be forfeitable, in whole or in part, but they are not part of Porcelli's RICO enterprise. Nor should realty companies that did not have offending companies on their land be included in the RICO enterprise. Similarly, the trucking and security companies were not part of Porcelli's RICO enterprise. They provided services to the offending retail gasoline companies; but, unlike the realty companies or the management company, they were not an integral part of Porcelli's fraudulent scheme.

The variance between the charged enterprise and the proof did not prejudice Porcelli and does not warrant reversal of his RICO conviction. Porcelli's defense to the RICO charge against all of the corporations specified in

the indictment necessarily included his defense against an identical RICO charge against the twelve offending operating companies, the realty companies, and the management company. *See United States v. Ianniello*, 808 F.2d 184, 189 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229 (1987); *United States v. Heimann*, 705 F.2d 662, 666-68 (2d Cir. 1983), *cert. denied*, 466 U.S. 962 (1984); *United States v. Sindona*, 636 F.2d 792, 798-99 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981).

E. Forfeiture

The jury found $4,755,000 and thirty-four separate corporations forfeitable to the federal government. On the basis of these findings, the district judge declared the moneys and properties forfeited to the United States with the limitations previously indicated. The thirty-four forfeited corporations included the twelve offending gasoline retail companies, as well as Ditmas Oil Associates, Inc., several realty corporations, the MK Armored Services Corporation, and Chamber Transport, Inc. Among the realty corporations, some owned the land on which gasoline station operators were located and some did not; some owned land both of offending and non-offending retail corporations.

Porcelli challenges this forfeiture on a number of grounds—statutory, evidentiary, equitable, proportional, and constitutional.

A RICO enterprise found in violation of section 1962 (c) is indivisible and is forfeitable in its entirety. *United States v. Anderson*, 782 F.2d 908, 917-18 (11th Cir. 1986); *Walsh*, 700 F.2d at 857; *Huber*, 603 F.2d at 397; *see* § 1963(a)(2)(A)-(C). The Eighth Amendment may limit the forfeiture where the enterprise is "substantially engaged in legitimate business." *Walsh*, 700 F.2d at 857.

In addition to forfeiting the RICO enterprise, the convicted racketeer must forfeit certain property interests outside the RICO enterprise. These include an "interest" acquired or maintained through a pattern of racketeering activity. § 1963(a)(1). The racketeer also forfeits any property or contractual rights that give him influence over the RICO enterprise. § 1963(a)(2)(D). And, as noted above, these forfeitures are subject to limitations. *See Horak*, 833 F.2d at 1243 ("but for" test; *cf. McKeithen*, 822 F.2d at 315 (proportionality under analogous forfeiture provision of CCE). The Congressional aim guiding these forfeitures is to recover all of the racketeer's ill-gotten gains but not to seize legitimately acquired property.

Porcelli must forfeit his RICO enterprise. If the enterprise had been too broadly defined, he could legitimately challenge this forfeiture. However, the enterprise as we have defined it was deeply implicated in Porcelli's fraudulent scheme. The judgment forfeiting the twelve operating companies, the realty companies associated with those companies, and Ditmas Oil Associates is therefore appropriate under section 1963(a)(2)(A).

In addition, Porcelli must forfeit certain interests outside his RICO enterprise. There is evidence of substantial transfers of money between Porcelli's various corporations. Porcelli portrays these as no more than arm's-length business dealings—the payment of rent, purchases of supplies, etc. They are, in fact, more than that. Funds derived from the operation of the RICO enterprise were proceeds obtained from racketeering activities. When Porcelli used his tainted profits to buy new properties, he acquired interests that were forfeitable under section 1963(a)(1). *See Russello*, 464 U.S. at 22 (proceeds of fraud forfeitable).

Through the testimony of Katz and with documentary evidence, the Government proved that money from Porcelli's operating companies helped to finance his expan-

sion. Frequently, funds were channeled through Ditmas, the management company; sometimes, money from the operating companies went directly to the realty companies that purchased new properties. The evidence showed that the following properties were acquired by means of extraordinary payments from the operating companies:

1. property on Coney Island
2. the Claudan Auto Center
3. the Terraneous gas station
4. the Ditmas oil terminal
5. Chambers Transport, Inc.
6. property at 2910 Northern Boulevard in Queens
7. property at 1153 Atlantic Avenue in Brooklyn
8. property at 15409 Union Turnpike
9. property at 2 West End Avenue

These properties are hence forfeitable under section 1963 (a) (1) to the extent of the contribution from the offending companies, but not necessarily in their entirety. *See Horak*, 833 F.2d at 1241-44; *Zang*, 703 F.2d at 1195. There is also evidence that Porcelli's business expanded and prospered as a result of his hard work and business acumen. In other words, these properties are not entirely the tainted fruits of Porcelli's fraud. The court below erred in not determining the extent of Porcelli's interest in these properties that he would not have acquired or maintained but for his fraudulent scheme. *See Horak*, *supra*. Similarly, forfeiture under section 1963 (a) (2) (D) (regarding sources of influence over the RICO enterprise) must be limited by *McKeithen's* rule of proportionality. This is a matter for reconsideration by the district court on remand.

Porcelli makes numerous other arguments as to the impropriety of the forfeiture, but we believe that they

are without merit. As to the cash forfeiture verdict, he claims that instead of multiplying the value of the gasoline sold by the sales tax rate of 8%, as the Government expert, the New York state tax auditor, testified, the jury should have divided it by 1.08. But the expert started from wholesale prices which did not include sales taxes and multiplied those prices by 8% to calculate the amount of sales tax a retailer should have added to his wholesale prices. This was in accord with the New York case of *W. T. Grant Co. v. Joseph*, 2 N.Y.2d at 204, 140 N.E.2d at 248, 159 N.Y.S.2d at 144 (vendor is "liable . . . for the taxes which should have been paid by his purchasers (or the amount of taxes actually collected, if that be greater)").

Porcelli's next argument is that if there were proceeds from underreported taxable sales, they were either obtained by the defendant himself, as to which there is nothing in the record, or retained by the business he owned. Forfeiture of both money and business under a "proceeds" theory is thus contrary to fact and violates double jeopardy. We agree with the Government that this ignores the terms and conditions of Judge Sifton's order insofar as it returns to Procelli any excess moneys remaining after the prescribed payments to the State and the United States.

Porcelli also argues that he could not have been subject to forfeiture under section 1963(a)(1), because that section was not specified as a basis for forfeiture in the bill of particulars. However, paragraph 35 of the indictment referred to this theory of forfeiture, and the only particulars Porcelli sought or the court required specified the properties subject to forfeiture, not the Government's legal theories. While at trial Porcelli did not object to the special interrogatory tracking the language of section 1963(a)(1), he now argues that the language of that special interrogatory did not sufficiently track the exact language of the statute, which covers interests acquired or

maintained "in violation of section 1962." The jury was asked to consider whether Porcelli's interests had been "acquired or maintained through his racketeering activity." This language is drawn from section 1962(b); but subsection 1962(c), the basis of this prosecution, also uses the phrase "through a pattern of racketeering activity." It was not error for the charge to overlap in this way with the language of section 1962(b).

Finally, the forfeiture verdict does not constitute unusual punishment. It provides for restitution to the victim—the State of New York—in an appropriate amount. By requiring Porcelli to pay the United States twice the amount owed to New York, the forfeiture verdict amounts to triple damages, something rather commonly known first in antitrust cases and now in civil RICO. We do not think that this is disproportionate within *Solem v. Helm*, 463 U.S. 277 (1983), or *Huber*. We note, too, that the forfeiture verdict simply deprives Porcelli of the fruits of his crime and that, while he could have been sentenced to up to twenty years in prison, 18 U.S.C. § 1963(a), his prison term runs only two years.

Porcelli's arguments pertaining to inadequacy of trial counsel under *Strickland v. Washington*, 466 U.S. at 687-90, are simply unavailing. Porcelli was represented at trial by Jay Goldberg, a well-known, experienced criminal lawyer, with assistance by Professor Steven A. Reiss, a former United States Supreme Court law clerk and a professor of law at New York University School of Law, and Edward M. Chikofsky, a former federal district court law clerk and adjunct professor at Fordham University Law School who was prevailing counsel in a recent significant RICO attorneys' fees forfeiture case, *United States v. Monsanto*, 852 F.2d 1400 (2d Cir. 1988) (en banc), *petition for cert. filed*, 57 U.S.L.W. 17 (U.S. Sept. 14, 1988) (No. 88-454). It is plain from the record that a considered decision was made by able counsel to seek to convince the jury that the charged mailings were not suf-

ficiently in furtherance of Porcelli's frauds to sustain the mail fraud charges. The defense also sought to portray this as an overzealous, unfair prosecution more properly brought in state court. They chose not to distinguish between offending corporations and nonoffending corporations and to make arguments based upon proportionality as in *McKeithen* or to advance some of the other arguments made on appeal relative to forfeiture, for the obvious reason that this would have amounted to a concession that Porcelli's racketeering profits in the gasoline station corporations which did file false returns would have to be forfeited.

Judgment of conviction of all counts except counts 2, 13, 18, 24, 40, and 51 affirmed; judgment of forfeiture reversed and remanded for further proceedings consistent with this opinion.

JON O. NEWMAN, *Circuit Judge*, dissenting:

Oscar Porcelli owes the State of New York nearly $5 million in state sales taxes that he failed to collect from his retail gasoline customers. New York is entitled to sue him civilly for those taxes and to collect penalties and interest. N.Y. Tax Law § 1145 (McKinney 1987). New York can also prosecute him criminally for the misdemeanor of willfully failing to collect sales taxes from a customer. N.Y. Tax Law § 1145(b) (McKinney 1966).[1] But New York has not pursued either of its state law remedies. Instead, the United States has charged Porcelli under federal mail fraud and racketeering statutes and has obtained a felony conviction that sends him to jail for six months and requires him to forfeit his property in an amount equal to three times the unpaid sales taxes. Before tolerating such an extraordinary disparity between federal and state enforcement techniques, especially as to a matter so central to the prerogatives of states as the collection of their own taxes, courts should be scrupulous in making sure that the conduct punished under federal authority falls within the reach of federal statutes. In my view, the mail fraud statute, as construed by the Supreme Court in *McNally v. United States*, 107 S. Ct. 2875 (1987), does not apply to Porcelli's conduct; moreover, if, as the panel's opinion holds, the statute could apply to Porcelli's conduct on a theory of concealment of a chose in action, his conviction is invalid because this theory was not charged in the indictment nor placed before the jury in the trial judge's charge and therefore, under well-settled law, cannot be the basis for upholding the verdict. I therefore respectfully dissent.

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[1] This version of section 1145(b) was in effect at the time of the events in this case. *See* 1965 N.Y. Laws, ch. 93, § 1145(b) (1965) ("any person willfully failing to collect the tax from a customer" is guilty of a misdemeanor). The current version, similarly worded, is N.Y. Tax Law § 1817(c) (McKinney 1987).

I. The Absence of a Deprivation of the State's Property

Prior to *McNally*, this Circuit and others had held that failure to pay state taxes could establish a scheme to defraud within the meaning of the federal mail and wire fraud statutes. *United States v. DeFiore*, 720 F.2d 757 (2d Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984); *United States v. Melvin*, 544 F.2d 767 (5th Cir.), *cert. denied*, 430 U.S. 910 (1977); *United States v. Brewer*, 528 F.2d 492 (4th Cir. 1975); *United States v. Mirabile*, 503 F.2d 1065 (8th Cir. 1974), *cert. denied*, 420 U.S. 973 (1975); *United States v. Flaxman*, 495 F.2d 344 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974). *McNally* requires us to reconsider the continued validity of that line of cases.

McNally contains two holdings. First, the Court held that fraud within the meaning of the federal mail and wire fraud statutes requires a "'deprivation'" of another's money or property. 107 S. Ct. at 2881 (quoting *Hammerschmdit v. United States*, 265 U.S. 182, 188 (1924)). Second, the Court held that "the intangible right of the citizenry to good government" is not property within the meaning of the federal fraud statutes. 107 S. Ct. at 2879.[2] *McNally*'s second holding, concerning the intangible right to honest government, is not implicated by Porcelli's appeal. But the first holding, requiring a deprivation of another's money or property, squarely applies. The deprivation need not be successful, but it must be the object of the scheme to defraud.

The panel majority recognizes that after *McNally* a mail fraud conviction may be upheld only upon proof that the defendant schemed to deprive another of money or property. As the majority puts it, and I fully agree,

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[2] As the Court was subsequently to make clear, some intangible rights, such as an employer's right to maintain the secrecy of its information, are property within the meaning of federal fraud statutes. *Carpenter v. United States*, 108 S. Ct. 316 (1987).

the concept of deprivation means "obtaining property with an intent not to pay as opposed to mere failure to pay." —— F.2d at ——. I also agree with the majority's further observation that Porcelli would have deprived the State of its property if it had been shown that he had collected sales taxes and had failed to remit them to the state tax colletcor.[3] But, as the majority acknowledges, there was no evidence that Porcelli collected even $1 of sales tax.

Moreover, the indictment does not charge him with collecting any sales taxes, nor describe the scheme to defraud as the failure to remit collected taxes. The indictment simply alleges that retail gasoline vendors are "required" to collect sales taxes and that Porcelli's scheme was to defraud the State of "sales taxes due." Though the indictment also alleges a scheme "to obtain monies *from* the State of New York" (emphasis added), there was no evidence that any money moved from New York to Porcelli, nor did the jury charge require the jury to find that this happened. The indictment charged and the proof established only that Porcelli failed to pay the sales taxes that he owed to New York because he had failed to collect them. *See* N.Y. Tax Law § 1137(e)(1) (McKinney 1987).

This distinction between owing uncollected taxes and failing to remit collected taxes is not just a technical matter of pleading and proof; it has significant dollar consequences for Porcelli and New York. New York im-

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[3] The majority suggests that collection of sales taxes by Porcelli from customers would have been proven if there had been evidence that the sales tax amount was posted on signs at the gas pumps. Obviously, this speculation cannot save the conviction because there was no such evidence. Moreover, it is not at all clear that sales taxes are ever reflected on signs at the pump, either in pennies or as a percent of the selling price. The state sales tax is not a gasoline excise tax, the amount of which is sometimes displayed at the pump.

poses an 8% sales tax.[4] If the United States (on behalf of New York) had charged Porcelli with collecting but failing to remit the sales tax, and if the evidence had shown that he did collect the tax, the amount of the tax would have been calculated by dividing Porcelli's sales revenue by 1.08 and subtracting the quotient from his sales revenue.[5] Thus, for each dollar of revenue, the tax collected would have been 7.4 cents. In other words, each dollar of revenue would have consisted of 92.6 cents of the sales price of the gasoline plus 7.4 cents (8% of 92.6) of sales tax. However, by charging Porcelli with failing to collect the tax, the Government was able to claim that Porcelli owed New York 8 cents for each dollar of revenue. The Government's use of the 8-cents--per-dollar approach produced a tax debt of $4,755,000, whereas the 7.4-cents-per-dollar approach would have produced a debt of $4,398,000. Thus, by alleging that Porcelli had never collected the sales tax from his customers, the prosecution gained an extra $357,000 for New York and an extra $714,000 for the United States in forfeited propertly.

The issue of law for us is whether, after *McNally*, a person has deprived a state of its money or property by failing to collect taxes and by failing to pay taxes he owes by reason of his failure to collect them. I believe the answer is "no." Unless and until extracted from Porcelli's customers, the dollars of sales taxes that he should have collected belonged to those customers, not the

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[4] The exact percentage of the tax varies throughout the state since there is both a state and a local sales tax. For Porcelli's sales, the prosecution used an 8 percent rate.

[5] This calculation is not only a matter of arithmetic; it was testified to by the prosecution's tax expert, an official of the New York Tax Department. After testifying that the amount of tax should be "backed out" using the calculation in the text if the tax had been collected, the expert then proceeded to calculate Porcelli's tax debt on the assumption that he had not collected the tax: the expert multiplied the prosecution's sales figures by 8 percent.

State of New York. Once Porcelli failed to collect the sales taxes, he became liable for the amount he should have collected, but that amount, in his hands, was still his property, not New York's. He owes New York the amount of sales taxes he should have collected, but a debtor does not deprive his creditor of the creditor's property simply by failing to pay the debt.

It is arguable that Porcelli has deprived New York of his personal share of all the services New York renders to its taxpayers; it is those services that Porcelli has obtained *from* New York by not paying the taxes he owes. But it is highly doubtful that a taxpayer's share of state services is the sort of property that may be the object of a mail fraud scheme after *McNally*. In any event, the indictment did not charge a scheme to defraud New York of a share of state services, and the case was not submitted to the jury on this theory.

What Porcelli has done is fail to pay a debt due the State of New York. Though the mail fraud statute has been given broad application, it has never been interpreted to cover nonpayment of debt and may not be so interpreted after *McNally*. Though willful evasion of taxes is commonly referred to as "tax fraud," the failure to collect sales taxes and the failure to pay the tax debt resulting from non-collection is not "fraud" in the common-law sense in which *McNally* uses that term.

II. The Panel's Theory of Deprivation of Choses in Action

Apparently recognizing that Porcelli may not be said to have deprived New York of its money or property simply because he did not collect sales taxes and did not pay his resulting debt to New York, the panel majority constructs a theory of deprivation of property based on the idea that Porcelli has deprived the state of its

"choses in action," its right to sue Porcelli for the amount of taxes he owes. I can readily agree that New York has a claim against Porcelli for the sales taxes that he owes and that this claim may be regarded as a chose in action. Even if this chose in action is "property" within the meaning of that term in *McNally*, it is questionable whether Porcelli has "deprived" New York of such property within the meaning of that term in *McNally* by concealing from New York the amount of the tax debt that he owes. But there is no occasion on this appeal to decide whether the mail fraud statute could be applied to Porcelli on a theory of depriving New York of its chose in action (as distinguished from its money) because this theory was not charged in the indictment, nor presented to the jury.

McNally itself is the most recent authority for the well-settled principle that an uncharged theory cannot be used to salvage a criminal conviction. After invalidating the conviction that had been obtained on the theory that McNally had deprived citizens of their right to honest performance of his duties, the Supreme Court refused to uphold the conviction on an alternative theory, pressed at oral argument, that McNally had obtained property (a share of insurance commissions) by means of false pretenses. The Court pointed out that "there was nothing in the jury charge that required such a finding [of receipt of money by false pretenses]." 107 S. Ct. at 2882. So here, there was nothing in the jury charge that required the jurors to find that Porcelli had deprived New York of its property by concealing a chose in action. The principle that a conviction may not be salvaged by a theory of violation not submitted to the jury has been invoked repeatedly. *E.g.*, *Chiarella v. United States*, 445 U.S. 222, 236-37 (1980); *Rewis v. United States*, 401 U.S. 808, 814 (1971); *Dunn v. United States*, 442 U.S. 100, 106-07 (1979).

Conclusion

Porcelli was not charged with collecting sales taxes and thereafter failing to remit to New York tax dollars that belonged to New York. The jury charge described his offense as defrauding New York of "sales taxes due on the retail sale of gasoline." Porcelli owed those taxes under New York law because he had not collected the taxes. He owes New York a debt, but he has not deprived New York of *its* money or property. After *McNally*, his conduct in failing to pay his sales tax debt is not within the scope of the federal mail fraud statute. The alternative theory that he deprived New York of its property by concealing its chose in action was neither charged nor submitted to the jury and may not be used to uphold the conviction. We should not strain to uphold a federal conviction for non-payment of state taxes, a matter best left, in the absence of clear federal law coverage, to the abundant civil and criminal authority of the states. For these reasons, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14 day of February, one thousand nine hundred and eighty-nine.

Present: Hon. James L. Oakes, Chief Judge,
Hon. Jon O. Newman, Circuit Judge.
Hon. John F. Keenan, District Judge.

87-1440, -1451

UNITED STATES OF AMERICA,
Appellee,

v.

OSCAR PORCELLI,
Appellant.

ORDER ON PETITION FOR REHEARING

In a petition for rehearing, Oscar Porcelli requests that we clarify our holding with respect to forfeiture. We agree that our remand does not open the door for the Government to "go after" everything. We have identified the RICO enterprise that is forfeitable in its entirety under section 1963(a)(2)(A). We have also listed nine properties that are at least partially forfeit-

able under section 1963(a)(1). No other properties are forfeitable under these two provisions.

We did not specify properties subject to forfeiture under section 1963(a)(2)(D), but it appears that most of the properties that were not interests acquired or maintained in violation of section 1962 would similarly fail to qualify as sources of influence over the RICO enterprise. The Gaseteria Oil Corporation might be an exception. Gaseteria is an unbrella company which apparently includes entitles that are already forefitable under section 1963(a)(1) or (a)(2)(A). However, the evidence does not support total forfeiture of Gaseteria under section 1963(a)(2)(D). The application here of the rule of proportionality in *United States v. McKeithen*, 822 F.2d 310 (2d Cir. 1987), is likely to limit the forfeiture of Gaseteria to those components of the corporation already forfeitable under other provisions of section 1963. In light of these facts, it is not yet appropriate to release Gaseteria from its restraints.

The petition is in all other respects denied.

/s/ James L. Oakes
JAMES L. OAKES
Chief Judge

/s/ Jon O. Newman
JON O. NEWMAN
Circuit Judge

/s/ John F. Keenan
JOHN F. KEENAN
District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Second day of March, one thousand nine hundred and Eighty-Nine

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Docket Number 87-1440, -1451

UNITED STATES OF AMERICA,
Appellee,

-v-

OSCAR PORCELLI,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellant, Oscar Porcelli.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

/s/ Fred M. Cassidy
By: FRED M. CASSIDY
Chief Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CR-85-00756(S)

UNITED STATES OF AMERICA,

—against—

OSCAR PORCELLI,

Defendant.

MEMORANDUM AND ORDER

SIFTON, District Judge.

Defendant, Oscar Porcelli, was originally charged with 64 counts of mail fraud, 18 U.S.C. § 1341. By superceding indictment dated April 14, 1986, Porcelli was charged with conducting his gasoline business through a pattern or racketeering activity, 18 U.S.C. § 1962(c), and with several counts of mail fraud. The crux of the alleged mail fraud scheme involved the supposedly systematic underreporting of New York State sales tax by filing and mailing sales tax returns that grossly understated defendant's gasoline stations' taxable sales of gasoline.

Defendant has moved to dismiss Count One of the superceding indictment pursuant to F.R. Crim. P. 12(b)(2) on the ground that the predicate acts charged in Count One of the indictment are not proper RICO predicate acts. The thrust of defendant's argument is that the Government is improperly attempting to "dou-

ble boot-strap" state tax evasion into a RICO predicate act by alleging the tax exasion as mail fraud. For the following reasons, defendant's motion is denied.

Defendant is correct that state tax evasion itself is not included among those state law offenses enumerated in the definition of racketeering activity set forth in 18 U.S.C. § 1961(1)(A). However, the predicate acts of racketeering activity charged in the indictment are violations of the mail fraud statute, 18 U.S.C. § 341, which clearly fall within the definition of racketeering activity set forth in 18 U.S.C. § 1961(1)(B). The question presented in this motion is whether an act of mail fraud that has as its purpose state tax evasion can serve as a predicate act of racketeering activity.

Initially, it must be recognized that schemes to evade state sales taxes in which the mails are used are properly prosecuted under the federal mail fraud statutes. *See, e.g., United States v. DiFiore*, 720 F.2d 757, 761 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 3511 (1984); *United States v. Melvin*, 544 F.2d 767 (5th Cir. 1977); *United States v. Brewer*, 528 F.2d 492 (4th Cir. 1975); *United States v. Mirabile*, 503 F.2d 1065 (8th Cir. 1974), *cert. denied*, 420 U.S. 973 (1975); *United States v. Flaxman*, 495 F.2d 344, 349 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974). Defendant argues that, although some state tax evasion may be federally prosecuted as mail fraud, "it is far more clear that this is true of the state sales tax evasion charged" against defendant. This argument is without merit. The theory of defendant's argument is that mail fraud prosecution against state tax evaders are properly brought only where the use of the mails itself allows the evader to escape the tax. Thus, defendant cites mail fraud prosecutions brought against individuals who use the mails to ship cigarettes from states with low cigarettes taxes to states in which such taxes are higher, thereby evading the latter state's taxes. *See, e.g., Melvin, supra*; *Brewer, supra*. However, this argument was con-

clusively rejected by the Eighth Circuit in *Mirabile, supra*, in which defendants, as here, were accused of mail fraud in connection with fraudulent state sales tax returns. The court explained:

> " 'To bring the scheme within the ambit of the mail fraud statute, the mails must be used for the purpose of executing the scheme, *Karr v. United States*, 323 U.S. 88, 93 (1944); must be employed before the scheme reaches fruition, *United States v. Maze*, 414 U.S. 395, 402 (1974); yet need not be contemplated as an essential element of the scheme, *Pereira v. United States*, 347 U.S. 1, 8 (1954).' "

Id. 503 F.2d at 1067, *quoting United States v. Nance*, 502 F.2d 615 (8th Cir. 1974). Since defendant here is accused of using the mails in furtherance of his scheme to defraud, the tax evasion here alleged is properly charged as a violation of the mail fraud statute.

Defendant argues further that, since at the time RICO was enacted state tax evasion had not been prosecuted as mail fraud, Congress did not contemplate that "state tax evasion could serve as the basis for a RICO prosecution by double boot-strapping it first into mail fraud and then into racketeering activity. This argument is also without merit. The fact that the precise fact pattern present in this case had not been the subject of a mail fraud prosecution does not demonstrate that Congress did not intend schemes like that involved here to be prosecuted under RICO in light of the dynamic reading historically given to the federal mail fraud statute.[1] As the court in *Mira-*

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[1] *See, e.g., Weiss v. United States*, 122 F.2d 677, 681 (5th Cir.), *cert. denied*, 314 U.S. 687 (1941), in which the court's described the broad scope of frauds properly prosecuted under the mail fraud statute:

> "The variety of means which may be employed in the execution . . . is limited only by the ingenuity of the schemer . . . The law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity."

bile, 503 F.2d at 1066, explained, in rejecting the defendant's argument that Congress did not intend the mail fraud statute to cover sales tax evasion:

> "We must interpret the plain language of § 1341 'broadly and liberally . . . to further the purpose of the statute; namely, to prohibit the misuse of the mails to further fraudulent enterprise.' *United States v. States*, 488 F.2d at 764. Such an interpretation is totally consistent with the ever-expanding role the mail fraud statute has played.
>
> "The diversity of schemes brought within the purview of § 1341 illustrates the expansive reading that is generally given to that statute. Thus, the contention that § 1341 was not meant to cover the fraud in the instant case is not persuasive."

Id. (citations and footnote omitted). Since Congress intended the mail fraud statute to cover schemes to defraud States of saleses where the mails are used in furtherance of the scheme and since Congress did not limit RICO predicate acts to certain acts of mail fraud but rather defined racketeering activity to mean, *inter alia*, "any act which is indictable under the following provision of title 18, United States Code Section 1341 (relating to mail fraud,)" 18 U.S.C. § 1961(1)(B), defendant's argument that Congress did not intend schemes like the present to be presented under RICO must be rejected.

Defendant's argument that "the rule of lenity and concomitant rules of statutory construction prohibit the use of state sales tax evasion as a RICO predicate" must also be rejected. The basis of this argument is that 18 U.S.C. § 1961(1)(A) constitutes Congress' judgment as to what state offenses can serve as RICO predicates. Thus, defendant argues, the specific language of § 1961 (1)(A) defining state offenses that can serve as RICO predicates should take precedence over the general provision of § 1961(1)(B). *See, e.g., Aetna Casualty Co. v.*

Phoenix Co., 285 U.S. 204, 208 (1932). However, there is no conflict between the two relevant provisions. The predicate racketeering acts charged are not violations of sttae tax law; rather, they are violations of the federal mail fraud statute. Neither § 1961(1)(A) or (B) limits mail fraud racketeering acts in any way.

Finally, although defendant argues that *Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312 (7th Cir. 1985), a civil RICO suit, suggests that state tax evasion may not serve as the basis for a criminal RICO prosecution because the Seventh Circuit was "clearly troubled by its decision," *Phillips* hardly supports defendant's position. In *Phillips*, the court reversed the district court's decision to dismiss the civil RICO suit charging the mailing of fraudulent state tax returns as predicate racketeering acts, stating:

> "Mail fraud qualifies as racketeering activity under the statute, 18 U.S.C. § 1961(1), and mailing fraudulent state sales tax returns qualifies as mail fraud."

For the foregoing reasons, this RICO count also does not raise the *ex post facto* problems as alleged by defendant. Accordingly, defendant's motion is denied.

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

Dated: Brooklyn, New York
June 13, 1986

/s/ Charles P. Sifton
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CR-85-00756

UNITED STATES OF AMERICA,

—against—

OSCAR PORCELLI,

Defendant.

MEMORANDUM AND ORDER

SIFTON, District Judge

On December 16, 1986, defendant Oscar Porcelli was found guilty of sixty-one counts of mail fraud, 18 U.S.C. § 1341, and one count of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) as a result of the filing of a series of fraudulent New York State sales tax returns with respect to sales at retail gasoline stations owned in whole or in part by Porcelli. On December 17, 1986, the jury returned a verdict pursuant to 18 U.S.C. § 1963 forfeiting $4,755,000, representing the unpaid sales taxes, as well as thirty-four of Porcelli's corporations of the United States.

The matter is currently before the Court on defendant's motion pursuant to Rule 29 of the Federal Rules of Criminal Procedure to set aside the verdict on each of the sixty-two counts on which Porcelli was convicted, as well as the jury's forfeiture verdict.

Viewing the evidence most favorably to the government, between 1978 and 1982, twelve of defendant's retail stations failed to pay approximately $4,755,000 in state sales tax, representing more than two-thirds of the $6.7 million in taxes the stations owed on sales in that period. Defendant does not challenge the sufficiency of the evidence as it relates to the number of stations involved, the amount that was underpaid, or as to his knowing and intentional participation in the filing and mailing of these grossly understated returns. However, since defendant does challenge the sufficiency of the evidence with respect to other aspects of the government's case, the following briefly summarizes the proof at trial.

Porcelli first entered the retail gasoline business in 1973. Working in partnership with Jimmy Garcia Sorrentino, from 1973 to 1979 Porcelli and Sorrentino purchased and operated a chain of retail service stations which by 1979 had grown to fourteen in number. After June 1, 1979, Porcelli terminated his business relationship with Sorrentino and each partner continued to operate half of the stations on his own.

Apparently in order to hamper tax audits of his entire operation, defendant organized his business in the form of a number of separate corporations. Each retail service station was owned and operated by a separate operating corporation. Each operating corporation in turn leased the underlying property from a separate realty corporation which either owned or leased the land. The management of all of these corporations was conducted through management companies, first Ditmas Oil Associates, Inc. and later Gaseteria Oil Corp. and Bosbay Service Center, Inc. At a point after the indictment period each of defendant's corporations became wholly-owned subsidiaries of Gaseteria.

At about the time that the fraudulent sales tax scheme began in late 1978, an accountant named Murray Katz began working for Porcelli and Sorrentino. After the

partnership split up, Katz continued to work for Porcelli. Katz testified that Porcelli directed him to report only a fraction of the correct gross and taxable sales figures for each tax quarter, and as a result Katz filed over 100 fraudulent returns on defendant's behalf. The government also introduced a tape of a conversation involving Porcelli and Katz that took place after the commencement of the state's audit in which Porcelli offered to pay Katz $200,000 to plead guilty to any criminal charges that might arise from their fraud.

A considerable amount of evidence was introduced to relate the funds created by the underpayment of taxes to the expansion of Porcelli's business. For example, either by direct testimony or stipulation, it was shown that during the period of the indictment defendant was able to purchase a wholesale gasoline terminal, a trucking company, and an armored car security company. In addition, defendant made numerous real estate purchases, and new service stations were added to the operation. By 1984, Gaseteria controlled 35 separate corporations. According to the testimony of Katz and another employee, Porcelli himself viewed the underpayments of sales taxes as "loans" from the state to help finance his expansion. There was also testimony to the effect that in 1979, when the expansion first began, defendant's then existing stations were barely breaking even and owed their survival to the funds generated by the tax fraud.

RICO

Defendant makes three arguments in an effort to set aside the RICO verdict. First, defendant contends that his prosecution was improper since Congress did not intend the RICO statute to be applied to violators of state tax laws. Second, defendant charges that the RICO count must be dismissed because the indictment charged an overly broad racketeering enterprise, not that revealed by the proof at trial. Third, defendant claims that the

proof at trial failed to show that he conducted his gasoline business through a "pattern" of racketeering activity. For the reasons set forth below, none of defendant's arguments requires that the jury's verdict on the RICO count be set aside.

While defendant concedes that the RICO statute itself is not unconstitutionally vague, *see United States v. Ruggiero*, 726 F.2d 913, 923 (2d Cir.), *cert. denied sub nom. Rabito v. United States*, 469 U.S. 831 (1984), he vigorously contends that the government's decision to apply it to state sales tax violations was an abuse of discretion, conflicting with both congressional intent and the Justice Department's own guidelines for RICO prosecutions. Defendant further contends that the government's decision to charge a RICO violation was improperly motivated since the RICO count was added to the indictment only after he refused to plead guilty to the mail fraud counts.

As a preliminary matter, this Court has already ruled in a pretrial memorandum that use of the mails to conduct state sales tax fraud falls within the definition of a RICO predicate act. *United States v. Porcelli*, No. CR-85-00756, slip op. (E.D.N.Y. June 13, 1986). Use of the mails for the purpose of executing a scheme to file fraudulent state sales tax returns may be properly prosecuted under the federal mail fraud statute. *United States v. Ianniello*, 808 F.2d 184, 193-94 (2d Cir. 1986); *United States v. Mirabile*, 503 F.2d 1065, 1067 (8th Cir. 1974), *cert. denied*, 420 U.S. 973 (1975); *see United States v. DeFiore*, 720 F.2d 757 (2d Cir. 1983) (wire fraud), *cert. denied sub nom. Coppola v. United States*, 466 U.S. 906 (1984).[1] There is no basis in the text of § 1961(1) to

[1] For the same reasons, defendant's suggestion that his prosecution violates the tenth amendment is without merit. Section 1341 applies to "any scheme or artifice to defraud" in which the mails were used. Thus, such a scheme may be punished under federal law, whether or not it is also punishable under state law. *Parr v. United States*, 363 U.S. 370, 389 (1960).

support defendant's contention that Congress intended to limit RICO prosecutions in cases involving violations of state law only to the state crimes listed as predicates in § 1961(1)(A). *Porcelli, supra*, at 5-6. Mail Fraud is separately listed within the definition of racketeering activity in § 1961(1)(B), and, therefore, the tax evasion scheme was properly charged under RICO. *See Ianniello, supra*, at 193-94.

Defendant now contends that regardless of whether his crimes technically fit within the terms of RICO his prosecution is still improper since Congress did not intend the statute to be applied to an "essentially lawful" business whose only crime is the violation of state sales tax laws. Citing appellate court warnings against the potential danger of RICO's improper use and undue prosecutorial zeal, *see United States v. Weisman*, 624 F.2d 1118, 1123 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980); *United States v. Huber*, 603 F.2d 387, 395-96 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), defendant contends that his conviction must be reversed since the government has failed to prove his involvement in any of the "organized" or "professional" criminal activities Congress intended to combat when it enacted RICO.

In determining whether RICO has been properly applied, the Court must rule on actual, as opposed to hypothetical, prosecutions. *See Weisman, supra*, 624 F.2d at 1123. In the present case, the Court finds that RICO was appropriately charged. The evidence adduced at trial established that over a five-year period defendant was responsible for underreporting more than $59 million in retail sales, with the net result that his corporations failed to pay nearly $4.8 million in sales taxes. Defendant then took these funds, which he personally characterized as "loans" from the state, and reinvested them into his business which eventually became a significant force in the retail gasoline market in this city.

The fact that defendant did not have any ties to organized crime presents no bar to his prosecution under RICO. *United States v. Hunt*, 749 F.2d 1078, 1088 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 3479 (1985); *United States v. Gottesmen*, 724 F.2d 1517, 1521 (11th Cir. 1984); *cf. Sedima SPRL v. Imrex Co., Inc.*, 105 S. Ct. 3275, 3285 (1985). Nor does the fact that defendant's business was otherwise conducted in a lawful manner preclude a RICO prosecution. The statutory definition of enterprise includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." § 1961(4). On its face this definition includes both legitimate and illegitimate entities. *United States v. Turkette*, 452 U.S. 576, 580-81 (1981). Indeed, there are numerous examples of RICO prosecutions in which, except for the commission of a "confined" pattern of racketeering, the enterprise was otherwise conducted in a lawful manner. For example, in *United States v. Huber*, *supra*, defendant was convicted under RICO for using his hospital supply business to defraud hospitals by inflating costs on "cost-plus" contracts and falsifying invoices. Apart from these frauds, defendant operated his business in an otherwise lawful manner. Similarly, in *United States v. Angelilli*, 660 F.2d 23 (2d Cir. 1981), *cert. denied sub nom. Butler v. United States*, 455 U.S. 910 (1982), New York City marshals were convicted under RICO for fraudulently conducting civil court auctions. The enterprise charged in *Angelilli* was the New York Civil Court, although there was no suggestion that the Civil Court or the marshal's office was not generally conducted in an essentially lawful manner. *See also United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 456 U.S. 943 (1982); *United States v. Conner*, 752 F.2d 566 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 72 (1986).

In essence, defendant invites the Court to impose a limiting construction on RICO's scope that would restrict

its application to only "essentially criminal" enterprises. Both the Supreme Court, *Sedima*, *supra*, 105 S. Ct. at 3287, and the Court of Appeals for this circuit, *Ianniello*, *supra*, 808 F.2d at 192 n.15, have recently warned courts against accepting such invitations. While it may be true that RICO's primary purpose is to combat the infiltration of legitimate businesses by organized crime, it is clear that the statute's broad terms permit applications beyond this type of case. As the Supreme Court noted in *Sedima* in response to a similar argument by a defendant to civil RICO action:

> "The fact that [RICO] is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued. Nor does it reveal . . . 'ambiguity' . . . . '[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'
>
> * * * *
>
> "[T]his defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress."

105 S. Ct. at 3287 (citation omitted).

Thus, defendant's reliance on the results in either *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983), or *United States v. Ladmer*, 429 F. Supp. 1231 (E.D.N.Y. 1977), is misplaced. Unlike the courts in both *Ivic* and *Ladmer*, defendant here is unable to point to any express statutory language or legislative history sufficient to sustain his proposed limiting construction in light of the plain meaning of the statutory definition of enterprise. 603 F.2d at 396. Given the extent of defendant's fraud and his own admission that his business could not have expanded without funds "borrowed" from the state, his

prosecution under RICO fits comfortably within the terms of the statute.[2]

Defendant makes two final arguments in support of his claim that his prosecution was "arbitrary." First, although he denies making a formal selective prosecution claim, defendant suggests that he has been singled out from others similarly situated. To make out a prima facie claim that the government has abused its discretion in selecting whom to prosecute, the defendant must show (1) that he has been singled out for prosecution from others similarly situated, and (2) the decision to prosecute was deliberately based upon an unjustifiable standard such as race, religion or the exercise of statutory or constitutional rights. *Wayte v. United States*, 105 S. Ct. 1524, 1531 (1985); *United States v. Ross*, 719 F.2d 615 (2d Cir. 1983). Regardless of the validity of defendant's efforts to compare himself to other tax evaders, a difficult prospect in itself given that defendant's proof relies primarily on newspaper reports, defendant has failed to make any legitimate showing that he was prosecuted with impermissibly discriminatory motives. As the Supreme Court recognized in *Wayte*, evaluation of the prosecutor's exercise of discretion is ill-suited for judicial review since it is based on such subjective factors as the "strength of the case, the prosecution's general deter-

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[2] Similarly, defendant's lengthy argument concerning the Justice Department's own RICO prosecution guidelines fails to lend support to his proposed limiting construction. While it is true that these guidelines may provide an important constraining force against the statute's improper application, such internal guidelines do not provide a proper basis for attacking convictions or indictments. *See, e.g., United States v. Booth*, 673 F.2d 27, 30 (1st Cir.), *cert. denied*, 456 U.S. 978 (1982); *United States v. Solano*, 605 F.2d 1141, 1143 (9th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980); *United States v. McInnis*, 601 F.2d 1319, 1323 (5th Cir. 1979), *cert. denied*, 445 U.S. 962 (1980). In any event, in light of the discussion above, there is no basis for concluding that the Justice Department violated its own guidelines in approving the prosecution of this defendant.

rence value, the government's enforcement priorities, and the case's relationship to the government's overall enforcement plan." 105 S. Ct. at 1531. Absent proof that the prosecutor here acted with the requisite bad faith, principles of separation of powers restrict further judicial inquiry into prosecutorial motive.[3]

Defendant charges that the government acted here with prosecutorial vindictiveness because it decided to indict him under RICO only after he refused to plead guilty to mail fraud charges. This claim is also without merit. Under *United States v. Goodwin*, 457 U.S. 368 (1982), and *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), in the absence of other evidence of improper motive, the mere fact that the government re-indicts with additional charges after pretrial plea negotiations fail is insufficient to create a presumption of prosecutorial vindictiveness. 457 U.S. at 380-84. Defendant, having failed to present evidence suggesting that the prosecutor here was motivated by a desire to punish him for exercising his right to trial, cannot make out a claim of prosecutorial vindictiveness.

Nor does defendant have a basis for reading into these precedents a requirement that some "aggravating" circumstance must exist to justify additional charges. There were no aggravating circumstances in *Bordenkircher*. *See* 434 U.S. at 358-59; *see also United States v. Kahn*, 787 F.2d 28 (2d Cir. 1986). Finally, *United States v. Meyer*, 40 Crim. L. Rptr. 2409 (D.C. Cir. 1987), involved at least two factors not present here. *Meyer* was a multi-defendant case, and the Court was persuaded of the likelihood of prosecutorial vindictiveness by the government's disparate treatment of defendants who went to trial and those who chose to plea. The government later

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[3] In any event, defendant's failure to raise the selective prosecution issue prior to trial constitutes a waiver. Fed. R. Crim. P. 12(b)(1); *United States v. Taylor*, 562 F.2d 1345, 1356 (2d Cir.), *cert. denied sub nom. Salley v. United States*, 432 U.S. 909 (1977).

chose to drop the additional charges, suggesting to the court a willingness on the government's part to "toy" with the defendants. Here, there is nothing except the government's decision to impose additional charges after pretrial plea negotiations failed.

Defendant's second line of attack on the RICO verdict is directed against the breadth of the "enterprise" charged in the indictment. Paragraph 21 of the indictment defines the RICO enterprise as an association—in-fact comprising 16 of defendant's operating companies, 6 of his reality corporations, and Ditmas Oil Associates,[4] which together constituted a single retail gasoline business. According to Porcelli, since only twelve retail stations were shown to have perpetrated a fraud, none of his other legally separate corporations was properly included in the enterprise since their affairs were not conducted through a pattern of racketeering activity. Relying on *United States v. Huber*, *supra*, defendant contends that the improper inclusion of these corporations in the enterprise requires dismissal of the entire RICO count.

In *Huber*, the defendant was charged with using his hospital supply business, comprised of seven separate corporations, to defraud hospitals. On appeal from his conviction under RICO, Huber contended that the prosecution had failed to establish that all of the seven corporations were involved in the enterprise. After finding that

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[4] Although paragraph 21 of the indictment also includes corporations that defendant did not keep an interest in after the breakup of the partnership with Sorrentino, for all practical purposes, the enterprise included only those corporations wholly-owned by defendant. In response to a special verdict, the jury found that each of the twenty-three listed corporations was, in fact, part of the enterprise. The jury was also asked whether corporations not named in the indictment were part of the enterprise. The government does not contend that these companies should now be included within the RICO enterprise, nor does the Court see how the question in any way prejudiced defendant during the jury's forfeiture deliberations.

a group of corporations could qualify as an enterprise within the meaning of § 1961(4), the Court of Appeals found that each of the defendant's seven corporations had been properly joined in the enterprise. In reaching this result, the court made clear that an entity could not properly be included in an enterprise unless its affairs were shown to have been conducted through a pattern of racketeering activity. After summarizing the evidence, including the transfer of funds between Huber's various corporations, the court concluded that the defendant's companies "were not merely unrelated businesses owned by the same person. They were all involved in the hospital supply operation, which could be fairly characterized as a single business operated under various names and forms chosen by appellant to suit his own purposes and convenience." *Id.* at 395.

Despite defendant's efforts to characterize his real estate corporations and the operating companies as "functionally different" and separate," the evidence at trial, viewed most favorably to the government, established that each of the twenty-three enterprise corporations was part of a single business enterprise in which the real estate corporations played a central role. The fact that Porcelli chose to divide his business into separate wholly-owned corporations, a decision which itself served his fraudulent scheme, cannot mask the fact that the companies charged in the enterprise operated a single business functioning under various names and in a variety of forms.

Having been instructed on the required nexus between the affairs of the enterprise and defendant's racketeering activity, the jury could reasonably infer that payments from the twelve operating companies to their respective real estate companies, though nominally "rents" or "loans," represented funds derived from the operating companies' fraudulent tax activities. Similarly, the four operating companies not shown to have filed fraudulent

returns were each purchased with funds which the jury could have found were derived from unpaid taxes on sales of other companies in the group. Finally, defendant's management company, Ditmas, played an integral role in the operation of defendant's business, providing accounting services for the operating companies in addition to serving as a conduit for funds used to finance defendant's business expansion. Thus, there was ample evidence to sustain the jury's finding that each of the listed corporations was in fact part of a single business operation and that that business was conducted through a series of mail frauds. *See Huber* at 395-96. Nor is there any merit to defendant's suggestion that the government charged a § 1962(c) violation but proved at trial a "wrongful acquisition" claim under § 1962(a) or (b). It was not necessary for the government to charge a violation of § 1962(a) or (b) in order to include within the defined enterprise corporations that were acquired during the period of the scheme. *See United States v. Martino*, 681 F.2d 952, 955 (5th Cir. 1982), *aff'd sub nom. Russello v. United States*, 464 U.S. 16 (1984). Accordingly, no variance occurred.

Defendant's final argument in support of his application for a judgment of acquittal on the RICO count is that a series of mailings in furtherance of single fraudulent scheme cannot, as a matter of law, satisfy RICO's pattern requirement. This argument must also fail since the notion that RICO requires proof of more than one illegal scheme has been rejected in this circuit by the Court of Appeals' recent decision in *Ianniello*.

Three of the *Ianniello* defendants attacked their RICO convictions on the ground that their only participation in the scheme to skim profits was the mailing of two deceptive license renewal applications in successive years for the same bar or restaurant. The defendants argued that these mailing were a single, discrete crime which could not amount to a pattern under RICO. 808 F.2d at 191.

After considering defendants' challenge in light of the Supreme Court's decision in *Sedima*, *supra*, 105 S. Ct. 3275, 3285 n.14, the Court of Appeals upheld the convictions. The court found that the elements of "relatedness and continuity" that the *Sedima* Court construed to be necessary to establish a "pattern" were best addressed in the context of the concept of "enterprise" and to a lesser extent by the ten-year requirement of § 1961(5). *Id.* at 191. Since an enterprise must be a "continuing operation" with a "common purpose" and the racketeering acts must relate to that common purpose, the court held that the pattern requirement could be satisfied whenever "a person commits two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated." *Id.* at 192.[5]

Defendant's attempt to limit *Ianniello* to cases where the sole purpose of the enterprise is committing crimes is unavailing. So long as an enterprise is established and two or more racketeering acts are shown to further the common purpose of that enterprise, *Ianniello* instructs that the pattern element will be satisfied regardless of whether the enterprise is essentially legitimate or illegitimate. Besides providing a vague rule of decision, defendant's reading of *Ianniello* is not supported by the facts of that case itself, since the enterprise charged there also included defendant's other legitimate restaurant and bar businesses. *See United States v. Ianniello*, 621 F. Supp. 1455, 1459 (S.D.N.Y. 1985).[6]

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[5] In reaching this result, the court rejected the Eighth Circuit's view that "pattern" requires proof of multiple schemes as a strained and inappropriate reading of the statutory language. *Ianniello*, 808 F.2d at 192.

[6] Defendant's reliance on *United States v. Margiotta*, 646 F.2d 729 (2d Cir. 1981), is misplaced. In *Margiotta*, the Second Circuit ruled that including multiple instances of mail fraud made in furtherance of a single fraudulent scheme in a single count of the indictment did not render the count impermissibly duplicitous. Contrary to defendant's contention, the Court's statement that each

Since it is clear that each of the approximately 100 fraudulent sales tax returns that defendant caused to be mailed over the course of several years shared the common purpose of furthering his enterprise, RICO's pattern element has been met on the facts of this case.

MAIL FRAUD

Porcelli challenges the verdict on each of the sixty-one mail fraud counts and the RICO verdict that they support on the ground that the counts were impermissibly duplicitous. He contends that the counts were duplicitous because they allege two alternative mailings: (1) the mailing of blank tax forms from the state to the taxpayer, and (2) the mailing of fraudulently completed forms by the taxpayer to the state. While defendant does not contest the sufficiency of the evidence to support his conviction based on the second of the mailings, he does contend that the government failed to establish that he knowingly caused the blank forms to be mailed or that the mailing of these blank forms furthered his fraudulent scheme. Defendant further contends that since the jury was not asked to return a special verdict indicating which mailings supported its decision a successful challenge to the first mailing is sufficient to require dismissal of each of the mail fraud verdicts and the RICO verdict as well.

With respect to counts 4, 19, 37 and 61, defendant's challenge must obviously fail since each of these counts does not allege a mailing from the state, but relies solely upon the mailing of fraudulently completed forms, which defendant concedes was sufficient to sustain a guilty

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of the mailings, although technically separate offenses, was really the jurisdictional basis for the federal prosecution went solely to the issue of what unfairness to the defendant might attend charging multiple mailings in a single count. *Id.* at 732-33. The court's ruling addressed the policy underlying the duplicity doctrine, not what constitutes a pattern of racketeering activity under RICO.

verdict. The sufficiency of these counts also disposes of defendant's challenge to the RICO verdict. To establish a violation of RICO, the defendant must be shown to have committed at least two racketeering acts within ten years of each other, § 1961(5), any one of which having occurred within five years of the indictment. 18 U.S.C. § 3282. Since each of these four mail fraud counts was also included in count one as racketeering acts, they are sufficient to support the RICO verdict regardless of the validity of the other mail fraud verdicts. *See United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). In addition, the RICO verdict is supported by the jury's finding of guilt on thirty-four of the racketeering acts that only allege the mailing of a fraudulent return by the taxpayer to the state. While these numerous racketeering acts could not, by themselves, support a RICO conviction since they all occurred more than five years before the indictment, when considered in conjunction with the four concededly valid mail fraud verdicts, they provide ample basis for establishing a violation of RICO.

Nor is it necessary to reach the merits of defendant's argument to resolve his challenge to all but six of the remaining mail fraud counts. As applied in this circuit, the duplicity doctrine does not prohibit the practice of charging multiple mailings in a single mail fraud count. In *United States v. Margiotta*, 646 F.2d 729 (2d Cir. 1981), the Court of Appeals upheld a mail fraud count that charged the defendant with fifty separate fraudulent mailings. After considering the various policy considerations underlying the duplicity doctrine, the court adopted a balancing approach that looks to the risk of unfairness to the defendant. *Id.* at 733. In the context of mail fraud, where each mailing, though technically a violation of the statute, essentially serves only as the jurisdictional peg for federal prosecution, the court concluded that charging multiple mailings in a single count would cause

no unfairness to a defendant so long as the jury is properly instructed on the elements of the crime and the need to find the mailing of at least one item in furtherance of the scheme to defraud. *Id.* Recognizing, however, that a defendant might want to identify the basis of the jury's conviction, the court approved the use of special interrogatories upon the defendant's request. *Id.*

In the present case, defendant first raised the duplicity issue when he moved prior to trial to dismiss the mail fraud counts on this ground. Relying on *Margiotta*, the Court denied the motion to dismiss without prejudice to defendant's right to request a special interrogatory at the time the case is submitted to the jury. Transcript of June 6, 1986, at 16-17. While defense counsel made a specific request at the charging conference for special interrogatories on each of the charged rackteering acts, defendant did not seek special interrogatories on the mail fraud counts.[7] Having perhaps for tactical reasons declined to make a specific request, defendant cannot now complain that without a special verdict it is impossible to tell whether the jury's verdict rested on a legally sufficient mailing.

Furthermore, analysis of the jury's verdict as a whole should put to rest any of defendant's fears that the jury relied solely upon the mailing of blank forms from the state. As noted above, four of the mail fraud counts and thirty-four of the racketeering acts are based solely upon the mailing of completed forms. Given the virtually identical proof on each of the mail fraud counts, no rational juror could have concluded that defendant mailed a completed form on these occasions, but only received a blank form and did not mail a completed form back at any of

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[7] Defendant incorrectly reads the record of the charging conference when he states that defense co-counsel in fact requested a special interrogatory on the mail fraud counts. It is clear from the record that no such request was made.

the other times. *Cf. United States v. Weisman*, *supra*, 624 F.2d at 1124a.[8]

Six of the mail fraud counts, however, allege only the mailings of a blank return from New York State, and, therefore, defendant's conviction on these counts can stand only if these mailings fall within the scope of § 1341. I conclude that they do.

Defendant first contends that the government failed to establish that he knowingly caused the mailing of blank returns to his retail gasoline stations. For purposes of § 1341, "one 'causes' the mails to be used where he 'does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended.'" *United States v. Maze*, 414 U.S. 395, 399 (1975), *quoting Pereira v. United States*, 347 U.S. 1, 8-9 (1954). Applying this standard, there was ample evidence to support the jury's finding that Porcelli "caused" the mailing of blank tax returns. At trial, a state taxation department official testified that blank tax returns were routinely mailed to businesses who registered with the state so as to be authorized to collect sales taxes from the public. Thus, the act of registration caused the mailing. The evidence at trial also showed that Porcelli was active in the daily operation of the retail corporations and that from 1973 through the pe-

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[8] Defendant's reliance on *United States v. Ruggiero*, 726 F.2d 913 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984), is misplaced. In *Ruggiero*, the court held that, once it had set aside defendant's conviction on a substantive count that also served as a RICO predicate, fairness to the defendant required it to assume that the infirm predicate act was necessary to the RICO verdict. *Id.* at 922. Since it was impossible to determine the basis of the jury's decision in the absence of a special interrogatory, the court reversed the RICO conviction as well. Thus, *Ruggiero* was concerned with unfairness to the defendant resulting from the duplicitous nature of a RICO count. *Margiotta*, however, holds that no such unfairness arises in the context of a mail fraud count.

riod of the indictment scores of blank tax forms were mailed by the state to his various gasoline stations. From this the jury could readily infer that throughout the indictment period defendant was able to reasonably foresee the use of the mails by the New York State tax authorities in furtherance of his schemes to defraud the state.

Defendant's second contention is that the routine mailings of blank tax returns cannot sustain a mail fraud conviction since they were not "in furtherance" of the scheme to defraud. To prove a violation of § 1341, "it is not necessary that the scheme contemplate use of the mails as an essential element." *Pereira*, *supra*, 347 U.S. at 8. Rather, mailings are considered to be made for the purpose of executing a fraudulent scheme if they are "sufficiently closely related" to the scheme, *United States v. Maze*, *supra*, 414 U.S. at 399, or they are "incident to an essential part of the scheme." *Pereira*, 347 U.S. at 8.

Relying on *Parr v. United States*, 363 U.S. 370 (1960), defendant asserts that the requisite connection has not been shown here. In *Parr*, the defendants were state employees charged with misappropriating taxes paid to a state school district. The only mailings underlying the mail fraud counts in that case related to the assessment and collection of taxes, duties assigned to the defendants by state law. Noting that there was no claim that the assessment itself was excessive or in any way unlawful, the Supreme Court held that the legally compelled mailings were not shown to be unlawful steps in a plot or incident to an essential part of the scheme "even though some of those who are so required to do the mailing for the district plant to steal, when or after received, some indefinite part of its moneys." *Id.* at 391. Porcelli argues that, as in *Parr*, the mailings of blank tax forms are simply "routine" mailings that may result in the execution of a scheme to defraud but which are not themselves "in furtherance" of that scheme.

The fact that the mailings were routine is of no significance since mailings in the ordinary course of business are clearly sufficient to support a mail fraud charge. *Pereira, supra*, 347 U.S. at 8; *United States v. Mangan*, 575 F.2d 32, 48-49 (2d Cir.) (mailing of fraudulently obtained federal income tax refund checks), *cert. denied*, 439 U.S. 931 (1978). Nor does it matter that the blank forms were themselves innocent or benign. *See Parr*, 363 U.S. at 390. But most significantly, in *Parr* the mailings were merely incidental to the defendants' legally compelled duty to collect taxes and, therefore, were unrelated to a subsequently enacted scheme to misappropriate the proceeds of the tax collections. Here, on the other hand, Porcelli's receipt of the blank tax forms was an essential element of an ongoing scheme to defraud the state of sales taxes. Viewed as such, the facts of this case are closely similar to those in which the mailing of blank personal checks to a defendant engaged in a check-kiting scheme were held to provide a sufficient basis for a mail fraud conviction. *See United States v. Freitag*, 768 F.2d 240, 243-44 (8th Cir. 1985); *United States v. Bosby*, 675 F.2d 1174, 1183 (11th Cir. 1982); *see also Ohrynowicz v. United States*, 542 F.2d 715, 718 (7th Cir.), *cert. denied*, 429 U.S. 1027 (1976). Furthermore, by having sales tax forms mailed to his offices on a quarterly basis, defendant was able to maintain an appearance of business regularity which helped to further his ongoing fraudulent scheme. *Cf. Bosby*, 675 F.2d at 1183; *United States v. Martin*, 694 F.2d 885, 890 (1st Cir. 1982).

In light of the above, there was sufficient evidence for the jury to find both that the mailing of blank forms was reasonably foreseeable to the defendant and that these mailings were sufficiently closely related to his fraudulent scheme to bring them within the ambit of the statute.[9]

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[9] Porcelli also puts forth an untenable argument that a scheme to obtain tax moneys from a state government cannot, as a matter

Forfeiture

Defendant seeks to set aside the jury's special verdict directing forfeiture of approximately $4.7 [million] in cash and his interest in thirty-four of the thirty-eight corporations listed in the indictment and the bill of particulars. The forfeited corporations include all of the twenty-three companies included within the RICO enterprise. The jury also forfeited additional retail stations, realty companies, a trucking company, an armored car company, and a gasoline terminal that were not included within the enterprise but were purchased either during or after the indictment period. The jury chose not to forfeit three realty companies and a construction company for which there was no proof at trial except a stipulation indicating that they are now wholly-owned subsidiaries of Gasteria. In effect, however, these corporations were forfeited as well since the jury voted to forfeit defendant's interest in Gaseteria, which now holds the stock of all the corporations subject to forfeiture.

The following special verdict form, prepared by the government and accepted by the defendant, was submitted to the jury with respect to each of the thirty-eight corporations subject to forfeiture:

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of law, be charged as a criminal scheme to defraud. Decisions upholding the application of the mail fraud statute to state tax evasion schemes directly hold to the contrary. See cases cited at p. 6, *supra*. Nor does the New York Court of Appeals' decision in *People v. Valenza*, 60 N.Y.2d 363, 469 N.Y.S.2d 642 (1983), support defendant's position. In *Valenza*, the court held that state sales tax fraud could not be charged as larceny by embezzlement in a state criminal prosecution. The court's decision, however, was based solely on the absence of any criminal sanctions for sales tax evasion in New York State's comprehensive tax enforcement scheme. As noted above, the federal mail fraud statute does encompass such activity regardless of whether it is characterized as "obtaining money" by fraudulent means.

"(A) Do you find beyond a reasonable doubt that this corporation is part of the enterprise which the defendant was associated with or employed by?

Answer: _____

(B) Do you find beyond a reasonable doubt that the defendant's stock ownership interest in this corporation is property which the defendant has acquired or maintained through his racketeering activity?

Answer: _____

(C) Do you find beyond a reasonable doubt that the defendant's stock ownership interest in this corporation afforded him a source of influence over an enterprise which the defendant established, operated, controlled, conducted, or participated in the conduct of, in violation of Title 18, United States Code, Section 1962?

Answer: _____

"(D) Do you find beyond a reasonable doubt that the defendant's stock ownership interest in this corporation was derived from any proceeds which he obtained, directly or indirectly, from his racketeering activity?

Answer: _____

Questions B, C, and D track the language of § 1963 (a), which states that a person found guilty of violating any provision of § 1962 shall forfeit to the United States:

"(1) any interest the person has acquired or maintained in violation of section 1962;

"(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

> (D) property or contractual right of any kind affording a source of influence over;
>
> any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and
>
> "(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962."

With respect to each of the thirty-four corporations ordered forfeited, the jury answered yes to all four questions on the verdict form.

Defendant contends that none of his property, including the $4.7 million, was properly forfeited under any of § 1963's provisions. Defendant argues that § 1963(a)(3) does not apply to him since all the acts charged in the indictment occurred before that section went into effect in October 1984.[10] Defendant argues that any retroactive application would violate the prohibition against *ex post facto* laws. With respect to § 1963's other two sections, while defendant concedes their applicability, he raises various factual and legal objections to the jury's forfeiture verdict.[11]

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[10] Section 1963(a)(3) was added by the Comprehensive Crime Control Act of 1984. The Act left § 1963(a)(1) and (2) substantially the same as in the pre-1984 law.

[11] Subsequent to oral argument, defendant brought to the Court's attention a recent decision of the Court of Appeals for the Third Circuit in which the court, exercising its supervisory powers, ordered bifurcation of *in personam* forfeiture proceedings from the guilt phase of criminal trials. *United States v. Sandini*, No. 85-150, slip op. at 9-12 (3d Cir. April 1, 1987). Whatever the merits of that decision, it does not require a new trial on the issue of forfeiture here, since the defendant, unlike the defendant in *Sandini*, never requested an opportunity to testify with respect to forfeiture. At trial, the forfeiture proceedings were bifurcated from the guilt phase to the extent that there were separate sum-

For the reasons set forth below, the jury's forfeiture verdict is affirmed. Since all of the properties were properly forfeited under either § 1963(a)(1) or (2), it is unnecessary to reach defendant's *ex post facto* argument concerning § 1963(a)(3).[12]

Defendant attacks all aspects of the forfeiture verdict to the extent the jury found that the forfeited assets were "acquired or maintained" in violation of § 1962. He contends that the $4.7 million in withheld taxes is not subject to forfeiture because there was no evidence showing that he ever personally received any of these funds. He also attacks the forfeiture of the twelve operating corporations shown to have underpaid taxes on the ground that the "enterprise" was not properly charged in the indictment. Finally, he contests the forfeiture of the "acquired" corporations on the ground that § 1963(a)(1) does not include "derivative" assets and because there was insufficient evidence connecting his business expansion and the proceeds of his illegal acts. None of these claims has merit.

Turning first to the $4.7 million in cash, defendant does not contest the fact that the "interest" subject to forfeiture under § 1963(a)(1) includes "profits or proceeds" from an enterprise conducted in violation of § 1962(c). *Russello v. United States*, 464 U.S. 16 (1983). Rather, defendant argues that these funds are not forfeitable because the government failed to estab-

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mations and jury instructions. Defandant, however, did not request an opportunity to present evidence concerning forfeiture and cannot now attack the jury's forfeiture verdict on these grounds. Moreover, in the absence of express direction from the Court of Appeals for this Circuit on this issue, the Court declines to relieve defendant of the waiver that occurred here.

[12] For all practical purposes, defendant's *ex post facto* argument is mooted by the Court's decision that § 1963(a)(1) reaches property acquired with racketeering proceeds. See discussion at pp. 36-38, *infra*.

lish that he ever personally received the money. Defendant's sole authority to support his claim that personal receipt of the money is a "*sine qua non*" of forfeiture is *United States v. Ginsberg*, 773 F.2d 798 (7th Cir. 1985) (*en banc*), *cert. denied*, 106 S. Ct. 1186 (1986). In *Ginsberg*, the defendant challenged the forfeiture of direct cash proceeds of his racketeering activity on the ground that there had been no showing that he still retained the money at the time of his conviction. In sustaining the forfeiture, the court held that § 1963(a)(1) does not require the government to trace and identify every dollar of proceeds in order to recover at the time of trial. Rather, the court stated, "to truly separate the racketeer from his dishonest gains . . . the statute requires him to forfeit to the United States the total amount of the proceeds of his racketeering activity, regardless of whether the specific dollars received from that activity are still in his possession." *Id.* at 802.

While the defendant in *Ginsberg* did not raise the issue of whether he actually received the proceeds, there is no indication that actual possession was an essential element of the court's decision, and, in fact, the decision suggests the contrary. In the present case, the defendant concedes that it was estabilshed at trial that twelve of his wholly-owned corporations failed to pay $4.7 million in sales taxes. It was further established that defendant controlled the bank accounts for these corporations and authorized the transfer of funds for various corporate purposes, including business expansion and investment in certificates of deposit. The fact that the unpaid taxes did not pass once through his own personal bank account on its way back to his wholly-owned corporations cannot insulate these ill-gotten gains from forfeiture. Such a restrictive reading of RICO's forfeiture provisions, which would encourage defendants to launder profits and proceeds through entities in their control, has no basis in the plain language of § 1963(a)(1) and would only serve to thwart Congress' remedial goals.

Defendant next seeks to avoid forfeiture of the twelve operating companies on the ground that the enterprise charged in the indictment was overly broad. Defendant's argument seems to be based on the erroneous view that "interests" subject to forfeiture under § 1963(a)(1) must be part of an enterprise that is acquired or maintained in violation of § 1962. *See* Defendant's Reply Memorandum at 48. In *Russello*, however, the Supreme Court expressly held that the term "interest" is not limited to the RICO enterprise. 464 U.S. at 22-24. Since it is clear that defendant's interest in these twelve companies was either acquired or maintained in violation of § 1962, they were properly forfeited under § 1963 (a)(1).

As for the remaining forfeited corporations, defendant raises a preliminary argument that any "acquired" interests cannot be subject to forfeiture since he was only shown at trial to have wrongfully "conducted" the affairs of an enterprise in violation of § 1962(c) and was not charged with acquiring an interest or investing in an enterprise in violation of § 1962(a) or (b). This claim, however, ignores the express language of § 1963(a) which ties forfeiture to violation of any provision of section 1962. *See United States v. Martino*, *supra*, 681 F.2d at 955.

Defendant further argues that the term "interest" as used in § 1963(a)(1) does not include property that is "derived" from racketeering proceeds. It is apparently defendant's contention that all of the forfeited properties except the twelve operating companies shown to have engaged in fraud constitute "indirect" proceeds and, therefore, fall outside the scope of § 1963(a)(1). The government, relying on *United States v. Russello*, *supra*, argues that "interest" includes both direct proceeds and property acquired or maintained with such proceeds.

In *Russello*, the Supreme Court held that an "interest" within the meaning of § 1963(a)(1) was not restricted

to interest in an enterprise, but also included profits and proceeds received as a result of activity proscribed by § 1962. 464 U.S. at 22. The Court thus upheld the forfeiture of insurance proceeds defendant had received as a result of his arson activities. Porcelli seeks to distinguish *Russello* on the ground that its holding is limited to direct proceeds of racketeering activity and not to property derived from racketeering proceeds. While it is true that *Russello* involved only direct proceeds, defendant reads the decisions too narrowly. In considering the ordinary meaning of the term "interest," the Court found it to "comprehend[] all forms of real and personal property, including profits and proceeds." *Id.* at 21. The legislative history further indicated an intent to create "new weapons of unprecedented scope" for attacking the economic base of organized crime. Heeding Congress' directive to construe liberally the terms of the statute, the Court found that a broad reading of the forfeiture provisions was necessary to serve the legislative goal "to remove the profits from organized crime by separating the racketeer from his dishonest gains." *Id.* at 28. Given this goal, the Court reasoned the Congress could never have intended to limit "interest" to interest in an enterprise since this would only encourage the speedy transfer of assets to avoid forfeiture. *Id.*

In light of *Russello*, it is clear that defendant's proposed construction of "interest" lacks support in either the statutory language or the legislative history. As noted in *Russello*, the term "interest" was likely chosen by Congress precisely because of its breadth, *id.* at 16, and there is certainly nothing on the face of § 1963 (a)(1) that would require defendant's construction.[13]

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[13] Since the statutory language is unambiguous, there is no occasion here to invoke the rule of lenity. That rule only comes into play when the language of a criminal statute is unclear. *Russello, supra*, 464 U.S. at 29; *Martino, supra*, 681 F.2d at 956 n.16. Nor does the reference in footnote 3 of the *Russello* opinion

Furthermore, if "interests" were construed to exclude assets acquired or maintained with racketeering proceeds their forfeiture could easily be thwarted by simply transferring ill-gotten gains to new properties or other investments that were not part of the original RICO scheme. This could not have been Congress' intent.[14] *Cf. United States v. Huber, supra*, 603 F.2d at 394; *United States v. Walsh*, 700 F.2d 846, 857 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983).

The Court further notes that the few relevant cases of which the Court is aware have also construed § 1963 (a)(1) to reach assets that were purchased with racketeering proceeds. *See United States v. Godoy*, 678 F.2d 84, 86-87 (9th Cir. 1982); *United States v. Rogers*, 602 F. Supp. 1332, 1341 (D. Colo. 1985); *United States v. Veliotis*, 586 F. Supp. 1512, 1518-20 (S.D.N.Y. 1984).

Of course, § 1963(a)(1) still requires the government to show that the interests subject to forfeiture were acquired or maintained in violation of § 1962. Defendant

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that the Court left unresolved any ambiguity that might be inherent in the terms "profits" or "proceeds" provide a basis for invoking the rule. As the entire footnote makes clear, the Court was only referring to the means of calculating profits or proceeds, *see United States v. Lizza Industries, Inc.*, 775 F.2d 492, 498 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 1459 (1986), and not to the statutory language itself.

[14] Both defendant and the government attempt to devine the meaning of § 1963(a)(1) from the fact that in 1984 Congress added § 1963(a)(3) which expressly includes derivative proceeds. As the *Russello* Court remarked in response to similar arguments, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." 404 U.S. at 26 (citation omitted). Cognizant of these hazards, the Court finds that the legislative history of the 1984 amendments supports the view that Congress intended to clarify existing law in response to a split in the circuits over the scope of RICO's forfeiture provisions. *See, e.g.*, S. Rep. No. 225, 98th Cong., 2d Sess. 194, 199, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3377, 3382. *See United States v. Rogers*, 602 F. Supp. 1332, 1340-41 (D. Colo. 1985).

claims that all but the twelve operating companies are insulated from forfeiture because the government failed to show that they were acquired or maintained with the proceeds of defendant's racketeering activity. Porcelli further argues that the evidence as to the funds transfers that were shown at trial was insufficient to sustain forfeiture since there was no evidence indicating that these payments were anything but legitimate rents or loans paid from one of his corporations to another.

As far as tracing the origin of the funds used to acquire or maintain these corporations, defendant's argument cannot be sustained since it would require the government to trace each dollar of sales tax that he withheld to the specific properties that he acquired. Forfeiture under RICO is a punitive not a restitutive measure, *United States v. Lizza Industries, Inc.*, 775 F.2d 492, 498 (2d Cir.), *cert. denied*, 106 S. Ct. 1459 (1986), and such precise tracing of funds is not required. *United States v. Ginsberg*, *supra*. Indeed, to require the government to show such a direct employment of illicit assets would, as a practical matter, render the statute ineffective against any defendant with the wherewithal to launder or otherwise conceal his illicit gains. *See United States v. McNary*, 620 F.2d 621, 638 (7th Cir. 1980).

To obtain forfeiture of a racketeer's assets, however, the government must show a nexus between the racketeering activity and the property claimed. *United States v. Cauble*, 706 F.2d 1322, 1348 (5th Cir. 1983), *cert. denied*, 456 U.S. 1005 (1984). While it is not necessary that the assets subject to forfeiture be themselves tainted by use in connection with the racketeering activity, *see United States v. Ginsberg*, *supra*, 773 F.2d at 801, there must be some showing that profits or proceeds of the defendant's racketeering activity provided a substantial or significant part of the consideration used to acquire or maintain the property interest sought to be forfeited. *See United States v. Washington*, 782 F.2d 807, 823-24

(9th Cir. 1986), *modified on other grounds*, 797 F.2d 1461 (9th Cir. 1986). In the present case, there was ample evidence to support the jury's finding that each of the forfeited companies were acquired or maintained as a result of defendant's racketeering activity. For example, Porcelli himself acknowledged that if it were not for his sales tax scheme he could not afford to stay in the retail gasoline business much less engage in expansion. He so stated in 1979, when his rapid business expansion first began, and again in 1982, after the state had begun its audit. This financial situation was corroborated by Murray Katz who testified that in 1978 defendant's stations were barely breaking even despite the gross underreporting of sales tax. The importance of the scheme to defendant's business survival can also be inferred from the fact that defendant continued to underreport sales taxes even after the state had begun to audit one of his stations. Finally, both Katz and another employee testified that Porcelli referred to the withheld taxes as a "loan" from the state to be used to finance his business. Indeed, Katz testified that during 1979 and 1980 Porcelli did not have any legitimate bank loans.

Thus, by failing to pay over $4.7 million in sales taxes, defendant was able to purchase other properties and maintain his various related realty, management and distribution companies through regular transfers of funds designated as loans or mortgage and rent payments. The fact that the government did not detail the source of financing for all of defendant's many acquisitions or that the purchase monies were comprised of commingled legitimate and illegitimate funds does not provide a basis for setting aside the forfeiture verdict.[15] Accordingly, all

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[15] Nor does the fact that the government's proof at trial only traced the purchase of new realty corporations and not the retail corporations located on those properties provide a basis for upsetting the jury's forfeiture of those retail companies. The proof at trial showed that defendant was able to maintain these retail

aspects of the jury's forfeiture verdict were proper under § 1963(a)(1).

In addition, defendant's interest in the enterprise charged in the indictment as well as any property affording him a source of influence of that enterprise was properly forfeited under § 1963(a)(2). Defendant, however, argues that none of his corporations was subject to forfeiture under § 1963(a)(2) since at the time of the indictment, when the government's interest in the property attached, there was no enterprise being conducted in violation of § 1962. According to defendant, if the racketeer has ceased his wrongful activities by the time he is indicted, RICO's remedial objectives are at that point fully served, and, therefore, forfeiture would no longer serve any valid purpose.

Defendant's primary support for his claim that there can be no forfeitable interest because his crimes ended before he was indicted is *United States v. McManigal*, 708 F.2d 276, 289-90 (7th Cir.), *remanded*, 464 U.S. 979, *vac'd in part, reaff'd in part*, 723 F.2d 581 (1983). *McManigal*, however, did not construe § 1963(a)(2) to require that racketeering activity continue to the time of indictment before the government can forfeit a defendant's interest in the enterprise. Rather, in refusing to apply the relation back doctrine in the context of § 1963(a)(2),[16] the *McManigal* court held that an inter-

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operations through his management corporation, Ditmas, which the jury concluded was part of the criminal enterprise. Thus, these retail corporations were "maintained" through defendant's racketeering activity.

[16] The court also refused to apply the relation back doctrine to proceeds subject to forfeiture under § 1963(a)(1). 723 F.2d at 581. Subsequently, the Seventh Circuit overruled this aspect of the decision in *United States v. Ginsberg, supra.* In *Ginsberg,* the court held that the interest of the United States in any proceeds of racketeering activity vests at the time they are illegally obtained. 773 F.2d at 801.

est in an enterprise is not forfeitable unless the interest is in existence at the time of conviction. Unlike the situation in *McManigal*, the defendant here is still in full possession of his interest in the enterprise, although the enterprise is no longer being conducted in violation of § 1962. Until the defendant divests himself of this interest, even the rationale of *McManigal* would require forfeiture, since the remedial purposes of RICO have yet to be served.[17]

It is now well settled that for purposes of § 1963 (a)(2) a defendant's entire interest in the racketeering enterprise is subject to forfeiture, regardless of whether those assets were themselves "tainted" by use in connection with the racketeering activity. *United States v. Anderson*, 782 F.2d 908, 917-18 (11th Cir. 1986); *United States v. Cauble*, *supra*, 706 F.2d at 1349; *United States v. Walsh*, *supra*, 700 F.2d at 857. Thus, defendant's stock interest in the enterprise corporations, comprising the sixteen operating companies, their counterpart realty corporations and the managing company, Ditmas, were all properly forfeited under § 1963(a)(2). Similarly, defendant's interest in the $4.7 million, his trucking company, his security company, and the Ditmas gasoline terminal was properly forfeitable under § 1963(a)(2) because they provided defendant with the means to conduct his enterprise. *See United States v. Zielie*, 734 F.2d 1447, 1458-59 (11th Cir. 1984).

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[17] Defendant reads too much into the district court's decision in *United States v. Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979), *aff'd*, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982). The *Thevis* court did not construe § 1963(a)(2) to require that the enterprise's racketeering conduct continue until the time of indictment or conviction. Rather, in interpreting the phrase in that section concerning "property or contractual rights of any kind affording a source of influence," the court stated that such property rights must have a continuing, as opposed to momentary, influence over the enterprise. 474 F. Supp. at 144.

Defendant raises two additional objections to the forfeiture verdict that can be briefly resolved. First, defendant asserts that the jury's responses on the special verdict forms indicate that its format led the jury indiscriminately to vote forfeiture under all possible rationales. As an initial matter, defendant's failure to raise an objection prior to the form's submission to the jury may be deemed a waiver. Fed. R. Crim. P. 30. In addition, the form that was used merely tracked the statutory language, and defendant makes no specific objection to the form's contents. Given that the use of such forms is specifically authorized by Fed. R. Crim. P. 31(e) and has been expressly approved of in this circuit, *Huber*, *supra*, 603 F.2d at 396, defendant's objection is without merit.

Second, defendant renews his claim that the enterprise charged here is overly broad and that he was thereby prejudiced by the government's ability to seek forfeiture of wholly legitimate companies. However, as discussed above, the enterprise charged in the indictment was not overly broad, nor is there any basis to conclude that defendant was, in any way, prejudiced by its scope. Accordingly, defendant's second argument must be rejected as well.

Eighth Amendment

Defendant also seeks to overturn the forfeiture verdict on the ground that it constitutes cruel and unusual punishment. He asks that the entire forfeiture verdict be set aside or alternatively that it be ameliorated by allowing him to "redeem" his business through payment of a sum of money to the Attorney General. The Court finds neither action to be constitutionally required.

The only limitations on RICO's forfeiture provisions are the eighth amendment's prohibition against cruel and unusual punishment, the Attorney General's discretionary power to ameliorate overly harsh forfeitures through

remission,[18] and the power of the court to impose proper terms and conditions on the Attorney General's seizure pursuant to 18 U.S.C. § 1963(f). *United States v. Walsh*, *supra*, 700 F.2d at 857.[19] While RICO's forfeiture provisions do not, on their face, violate the eighth amendment, *United States v. Huber*, *supra*, 603 F.2d at 396, the Court of Appeals for this circuit has recognized that in certain circumstances a particular forfeiture may be so harsh as to constitute cruel and unusual punishment. In *Huber*, the Court of Appeals stated:

> "[W]here the forfeiture threatens disaproportionately to reach untained property of a defendant, for example, if the criminal and legitimate aspects of the 'enterprise' have been commingled over time, § 1963 permits the district court a certain amount of discretion in avoiding draconian (and perhaps potentially unconstitutional) applications of the forfeiture provision."

602 F.2d at 387. Relying on § 1963(c) (now codified as § 1963(f)), the court upheld the district court's imposition of a condition on forfeiture that permitted the de-

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[18] At oral argument defendant's counsel indicated that she had not yet approached the Attorney General with a request for remission of the forfeiture. The Court encourages the parties to pursue such discussions and suggests that one possible way to remit this admittedly large forfeiture would be to allow defendant to retain any stations and property or assets with equivalent value that defendant owned before he began to underpay his taxes.

[19] While other circuits have taken the view that RICO forfeitures are mandatory and leave a district court with no authority for amelioration, *see United States v. Kravitz*, 738 F.2d 102, 104-05 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); *United States v. Hess*, 691 F.2d 188, 190 (4th Cir. 1982); *United States v. Godoy*, 678 F.2d 84, 88 (9th Cir. 1982), *cert. denied*, 464 U.S. 959 (1983); *United States v. L'Hoste*, 609 F.2d 796, 809-13 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980), this circuit applies a more flexible rule.

fendant to redeem his companies upon payment of $100,000. *Id.*

Despite defendant's efforts to minimize the magnitude of his fraud or to compare himself to other tax violators who go unpunished, the jury's forfeiture verdict does not run afoul of the eighth amendment nor is there any basis for ordering amelioration. *Walsh* makes clear that the defendant bears the burden of moving to ameliorate the harshness of a forfeiture verdict. 700 F.2d at 857. Defendant here, however, failed to introduce any evidence indicating the degree to which his businesses were "untainted" by his tax fraud. Instead, the government's evidence showed that the defendant engaged in a continuous and long-running tax fraud whereby he failed to pay $4.7 million of the approximately $6.7 million he owed in state sales taxes. It is undeniable that this infusion of funds provided a crucial element in defendant's business expansion. Moreover, the evidence established that defendant continued his fraudulent scheme even after the state's tax investigators began to audit one of his stations. Finally, when it became clear that his entire business was implicated and a criminal prosecution was imminent he tried to pay his accountant to accept the blame for him. In light of both the pervasiveness of defendant's fraud and the degree of his culpability, the forfeiture verdict cannot be said to be disproportionate to defendant's crime.[20] Nor is there a basis for defendant's claim that the punishment here is unusual. As the cases discussed in this opinion establish, there is ample precedent for the forfeiture of businesses used to perpetrate crimes or acquired with the proceeds of crimes.

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[20] Defendant's suggestion that forfeiture, like the death penalty, is a "qualitatively different" punishment because it is "final" and "irreparable" is absurd. Forfeiture is generally considered less cruel than either imprisonment or death.

Accordingly, the defendant's motion to set aside or reduce the jury's forfeiture verdict is denied.

The Clerk is directed to mail a copy of the within to all parties.

SO ORDEDED.

Dated: Brooklyn, New York
May 27, 1987

/s/ Charles P. Sifton
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CR-85-00756

UNITED STATES OF AMERICA,

—against—

OSCAR PORCELLI,

Defendant.

MEMORANDUM AND ORDER

SIFTON, District Judge

On December 16, 1986, defendant, Oscar Porcelli, was convicted of sixty-one counts of mail fraud, 18 U.S.C. § 1341, and one count of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), as a result of defendant's filing a series of fraudulent New York State sales tax returns with respect to sales at retail gasoline stations owned in whole or in part by defendant. On December 17, 1986, following supplemental closing arguments by counsel, the jury returned a verdict pursuant to 18 U.S.C. § 1963 forfeiting to the United States $4,755,000, representing the unpaid sales taxes, as well as thirty-four of defendant's corporations.

The matter is currently before the Court on defendant's motions seeking partial reargument of the Court's May 27, 1987 decision denying defendant's motion to set aside the verdicts of guilt and forfeiture, striking a statement in the presentence report, and granting a stay of

the judgment of conviction pending appeal. Defendant has also moved for a new trial due to ineffective assistance of trial counsel.

The proof adduced at trial is summarized in the Court's May 27 decision, and knowledge of these facts is presumed. The following additional facts are derived from papers submitted on these motions and are undisputed except as noted.

Ineffective Assistance of Counsel

Defendant's defense at trial was conducted by a team of unusually qualified and experienced attorneys. Jay Goldberg, a seasoned criminal defense attorney with prior experience in defending RICO prosecutions, served as lead counsel at trial. Assisting Mr. Goldberg both before and during trial was Edward M. Chikofsky, a former clerk to a United States district court judge and currently an adjunct professor at Fordham University Law School. In addition, defendant retained Stephen A. Reiss, a professor at New York University School of Law and former United States Supreme Court clerk, to assist with the development of legal issues and pretrial investigation.

According to affidavits from Messrs. Chikofsky and Goldberg, defense counsel's strategy at trial was essentially two-fold. Concentrating on the federal nature of the prosecution, trial counsel attempted to portray defendant as a victim of overzealous prosecution by convincing the jury that a state sales tax matter did not belong in federal court and that the proof of use of the mails was insufficient. Second, concentrating on the intent element of the mail fraud statute, defense counsel tried to paint defendant as an "outside man" in his own company who, as the result of unfamiliarity with financial affairs, became the unwitting victim of disloyal employees. In particular, counsel pinned their hopes for acquittal on discrediting the testimony of Murray Katz,

defendant's accountant who himself stole money from defendant both before and after deciding to cooperate with the government.

Although defendant makes a blunderbuss attack on the performance of his former counsel, the main thrust of his objections concerns the handling of forfeiture issues. In this regard, defendant's arguments can be fairly broken down into two categories. First, it is argued that trial counsel failed to make reasonable investigation in order to develop an evidentiary basis to rebut the government's forfeiture theories. In particular, defendant contends that reasonable investigation would have revealed facts indicating that many of the corporations listed in the indictment, including defendant's real estate companies, were not sufficiently related to constitute a single enterprise within the meaning of *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). In addition, defendant contends that such investigation would have uncovered evidence to sustain an argument that the full value of his non-enterprise companies should not be forfeited. Second, defendant contends that, even with the proof adduced at trial, defense counsel failed to make various legal arguments or objections to the charge and special interrogatories that would have limited defendant's exposure to the forfeiture request. In particular, defendant objects to Mr. Goldberg's summation at the forfeiture phase of the trial.

In evaluating counsels' performance in the context of a sixth amendment claim, the Court must determine "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to prevail, defendant must show both that counsel's representation fell below "an objective standard of reasonableness" under "prevailing professional norms," *id.* at 688, and that there exists a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A successful claim may be based upon counsel's overall representation of the client or upon a single error which by itself is sufficiently serious to break down the adversarial process. *See, e.g., Kimmelman v. Morrison*, 106 S. Ct. 2574, 2588 (1986). In assessing any claim, however, "every effort must be made to eliminate the distorting effects of hindsight" and to judge counsel's conduct in light of "the particular facts of the case viewed from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. To assure that this is done, the Court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance" and that "under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (citation omitted).

To support his claim that trial counsel failed to conduct reasonable investigation, defendant has submitted affidavits from several senior employees of his companies. Some of the affidavits speak in general terms of defendant's entrepreneurial vision and capacity for hard work, which defendant's current counsel suggests could have been used to establish a legitimate explanation for defendant's business expansion. An affidavit from defendant's comptroller, who claims to have never been interviewed by defense counsel concerning defendant's corporate affairs, also details the extent to which some of defendant's businesses are involved in ventures that do not directly relate to retail gasoline sales. Defendant maintains that this evidence could have been used to rebut the government's enterprise and taint theories. Defendant submits a somewhat obtuse analysis by an accountant as an illustration of the type of expert testimony on these theories that could have been produced at trial.

In response, the government has submitted affidavits from each of the three members of defendant's defense

team. The affidavits which detail the investigative efforts and strategic decisions made in light of these efforts make clear that defendant was provided effective assistance of counsel.

As the Supreme Court stated in *Strickland*, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support limitations on investigations." 466 U.S. 690-91. Moreover, a critical factor in assessing the reasonableness of counsel's efforts is the defendant's statements to counsel regarding his own defense. *Id.* Here, trial counsel state without substantial contradiction that, despite frequent meetings with defendant as well as his accounts Alan Schacter, David Shafer, and Donal Meyers,[1] they were unable to uncover any persuasive evidence either to narrow the enterprise charged in the indictment or to establish that portions of defendant's business expansion were not, at the least, acquired or maintained by means of the underpaid sales taxes. With respect to the scope of the enterprise, counsel state that the complete disarray of defendant's corporate books, records, and bank accounts precluded the development of any viable argument based upon *Huber*. Moreover, Mr. Goldberg states that defendant was repeatedly asked to supply relevant documents relating to the financial affairs of his companies, but defendant failed to do so. Similarly, defendant refused to allow a private investigator hired by the defense team

[1] In a reply affidavit, Mr. Meyers states that, although he met with the defense team on six separate occasions, he was not asked questions concerning the "relatedness" of defendant's corporations, the impact of legitimately earned income on defendant's business expansion, or the possibility of tracing unpaid tax monies through defendant's different corporations. No affidavits have been submitted from Messrs. Shacter or Shafer. Nor has defendant submitted an affidavit on his own behalf.

to interview employees who might provide impeachment material for use against Murray Katz or information concerning the manner in which defendant conducts his business. As for developing any argument that defendant's business would have been viable in the absence of his tax evasion scheme, Mr. Goldberg states that defendant repeatedly admitted that his corporations could not have survived without his having "skimmed" the state sales taxes owed on retail gas sales and that everyone else in the industry was doing the same. Indeed, defendant was so adamant on this issue, counsel state, that they investigated as possible defenses claims based upon selective prosecution and economic necessity or duress.

Thus, given the facts known to them, counsel, with the approval of defendant, made a strategic decision to pursue a defense based upon prosecutorial overzealousness, since it posed the least danger of rebuttal by the government. In addition, due to the state of defendant's business records, counsel developed a portrait of defendant as a victim of not only the government, but his employees as well. This latter claim precluded much of the testimony proposed by current counsel since it would have involved placing on the stand people with knowledge of the extent of defendant's actual involvement in his business' financial affairs. Rebuttal testimony now proposed by defendant, to the extent it placed in issue defendant's character, risked opening the door to damaging other act evidence in the government's possession.[2] Whether coun-

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[2] To the extent that trial counsel's strategy on guilt issues conflicted with possible forfeiture defenses, the Court does not agree with defendant's claim that trial counsels' failure to request a bifurcated trial constituted ineffective assistance. While bifurcated trials may become more common in this area, *see United States v. Sandini*, 816 F.2d 869 (3d Cir. 1987) (decided after the trial of this case), this was not the practice at the time defendant went to trial, and counsels' failure to develop new law on this issue did not fall below the level of objective reasonableness. In addition, there are sound reasons for not requesting bifurcation since it

sel's choices are viewed as having been made upon thorough investigation or upon less than complete investigation reasonably limited, counsel's conduct fell within the wide range of professionally competent assistance.

Defendant also raises a host of objections, many frivolous, to his counsel's performance during the forfeiture phase of the trial. Due to their volume, the Court's discussion of each objection will be relatively brief. First, defendant contends that defense counsel should have attacked the government's reliance on § 1963(a)(3) on *ex post facto* grounds. Defendant's prior counsel, however, state that they expressly considered making such an attack but decided against it based upon their estimation of the merits of such a claim. While the Court agrees with defendant's current counsel that the argument is non-frivolous,[3] it does not agree with the suggestion that counsel has an obligation to raise all non-frivolous arguments to satisfy the sixth amendment. Weighing arguments and winnowing out those that may be weakest is at the heart of effective representation. *See Berger v. Kemp*, 55 U.S.L.W. 5131, 5134 (1987).

Next, defendant challenges the adequacy of Mr. Goldberg's summation on forfeiture issues. In his closing argument, Mr. Goldberg appealed to the jury not to forfeit any of defendant's money and properties on the ground that the federal government, not shown to have been a victim, should not be permitted to earn a windfall on a RICO prosecution. His strategy, in part a continuation of the defense team's approach to the entire trial, was to convince the jury that forfeiture would leave the true victim, the state, without means to collect its debt. In addition, it would leave the defendant faced with the

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provides the government with an opportunity to concentrate on forfeiture issues to a degree perhaps unavailable during the guilt phase.

[3] But see discussion at note 8, *infra*.

prospect of having to pay twice for the same wrong. Had defendant prevailed on this argument, he would have avoided forfeiture entirely.

Dissatisfied with the result, defendant now attacks this approach in favor of arguments seeking to limit defendant's exposure with respect to specific corporations and exploit weaknesses in the government's proof with respect to individual companies in the group. It is, to say the least, questionable whether a more detailed examination of the facts in summation would have produced a different forfeiture result. However, as the Supreme Court has admonished, "[i]t is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 668. Here, in the face of evidence at trial that defendant could not have stayed in business but for his fraud, including his own admission that he considered his unpaid taxes "loans" from the state required for the expansion of his business, defense counsel understandably eschewed detailed forfeiture arguments on summation. To have made fact-specific arguments such as those now urged by defendant would, moreover, have virtually conceded the forfeiture of many of defendant's corporations. Furthermore, the government's own forfeiture summation failed to delve into the details of defendant's internal corporate affairs, and for defendant to have raised them himself would have invited greater factual scrutiny by the government on rebuttal. As might be expected, the jury, adequately instructed, went beyond the prosecutor's generalities and itself excluded several companies from the forfeiture verdict.

Defendant also complains of counsel's failure to object to several aspects of the special interrogatories submitted to the jury. First, defendant contends that the govern-

ment should have been precluded from relying on § 1963 (a)(1) as a basis for forfeiting any companies because the bill of particulars states that forfeiture of all companies would be sought pursuant to § 1963(a)(2) and (3). Even if counsel should have raised this point, defendant suffered no prejudice since the jury found forfeiture appropriate on the provisions properly relied upon. The bill of particulars, which listed each of the properties sought by the government, provided defendant with adequate notice of the extent of his properties subject to forfeiture. *See United States v. Grammatikos*, 633 F.2d 1013, 1024 (2d Cir. 1980). In addition, having been given notice that the government would rely on § 1963(a)(2) and (3), defendant has not shown what additional steps he might have taken to defend his property against forfeiture under § 1963(a)(1).[4]

Similarly, there is no basis for defendant's alternative argument, raised for the first time in his reply memorandum, that it was ineffective assistance for trial counsel not to object to forfeiture under § 1963(a)(1) on the ground that the jury instructions did not cover this subsection. The language of the interrogatory itself was self-explanatory, and defendant no doubt benefited from the absence of emphasis on this theory of forfeiture in the charge. In all events, the jury found forfeiture appropriate on the statutory provisions which were elaborated on in the charge. Hence, no prejudice occurred

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[4] Nor is there any merit to defendant's efforts to prevent the government's reliance on the "afford a source of influence" prong of § 1963(a)(2) on the basis of certain statements contained in a government pretrial memorandum. The statements, pertaining to the scope of the forfeiture request, were made in a government brief in opposition to defendant's request for a bill of particulars and, therefore, were supplanted when the government stated in its bill that it would seek forfeiture under § 1963(a)(2) as a whole. Any expansion that might have occurred in the one-month interim between the filing of the brief and the bill did not cause prejudice, as defendant still had ample time to prepare for trial.

because of an absence of elaboration in the jury instructions.

Next, defendant challenges counsels' failure to object to the language of Interrogatory "A" on the ground that it suggested to the jury that they could include defendant's corporations in the enterprise solely because defendant owned them. Again, counsels' failure to object, however, did not violate the sixth amendment, given the absence of prejudice. First, it is clear from the jury's prior determination of guilt that the government had convinced the jury beyond a reasonable doubt of the enterprise element without any confusion which might have been produced by the wording of the interrogatory which was not in the jury's hands until after guilt had been found. As for the scope of the forfeiture, no prejudice arose from the wording of the interrogatory in light of the alternative grounds of the jury's forfeiture verdict.

There was also no prejudice resulting from defense counsel's failure to raise defendant's remaining objections to the special interrogatory, since the errors, if any, were harmless. These include defendant's objection to the language of interrogatory "B" on the ground that it did not precisely track the language of § 1963(a)(1), as well as the claim that Interrogatory "A" should only have been asked in connection with the enterprise corporations listed in the indictment. As noted, the jury found forfeiture appropriate on each ground tendered to them. Thus, any error on one of the alternative grounds for forfeiture deprived defendant of no right.

Defendant's challenge to the sufficiency of defendant's requests to charge, arguing that they further evince trial counsels' ignorance of forfeiture issues and RICO in general, is also meritless. The fact that the requests relating to forfeiture did not include the precise language that defendant now insists upon does not establish ineffective

assistance of counsel, but only the varieties of ways that counsel can effectively assist clients.

With respect to the guilt phase of the trial, defendant notes two respects in which he claims counsel's performance was ineffective. First, defendant contends that Mr. Goldberg failed to argue "RICO issues" effectively to the jury during his summation. According to defendant, Mr. Goldberg's concentration solely upon defendant's guilt of mail fraud reveals a "lack of understanding of" RICO. It is clear, however, that Mr. Goldberg's summation was not based upon ignorance of the elements of RICO, regarding which defendant submitted comprehensive requests to charge, but rather reflected a sound strategic decision to argue the case without reliance on credibility with the jury. Moreover, given the proof at trial, it was not unreasonable to eschew technical arguments concerning the elements of § 1962(c) which were dealt with in the Court's charge on the law, particularly in light of the jury's demonstrated ability to consider such matters unaided by counsel.

Second, defendant criticizes counsel's failure to minimize the impact of a tape recording of a dinner meeting attended by defendant and Murray Katz that the government persuasively argued reflected an effort by the defendant to bribe Katz into pleading guilty to state tax evasion charges. Counsel's handling of the tape, however, was in all respects proper. Prior to trial, counsel moved to exclude the entire tape on grounds of lack of relevancy and prejudice. When those efforts failed, counsel was able to exclude at trial other portions of the tape that the government contended referred to an additional attempt to bribe state tax officials. Furthermore, the type of evidence that defendant now contends would effectively rebut the suggestion that he was offering a bribe would have placed defendant's character in issue and opened the door to a variety of other act evidence

that defense counsel had otherwise successfully evaded. Finally, given the overwhelming evidence of defendant's involvement in the tax fraud scheme, defendant cannot claim to have been prejudiced by defense counsel's treatment of this issue.

Reconsideration

Defendant challenges certain statements in the Court's May 27 decision to the effect that defendant had "conceded" that the mailings of tax returns to the state are sufficient to sustain a guilty verdict for mail fraud. The Court's statements, however, were made solely in the context of defendant's Rule 29 motion in which defendant had explicitly declined to challenge the sufficiency of the evidence as it related to the falsity of defendant's returns, the amount of taxes underpaid, and defendant's guilty participation in the filing of understated returns. It was to these "concessions" that the Court referred, not to his defense at trial.

Defendant also challenges the Court's statement that the pattern element of § 1962(c) would be satisfied based solely upon the four mail fraud counts and 41 racketeering acts that only charge a mailing of falsely completed tax returns. Defendant's argument appears to be that, if one or some of the racketeering acts are successfully challenged, the entire verdict must be overturned since, otherwise, the Court would be indulging the assumption that the jury would have found the pattern requirement to have been satisfied even without the faulty racketeering acts.

A pattern of racketeering activity requires at least two acts of racketeering within a ten-year period, one of which having occurred within five years of the indictment. *See* § 1961(5). Here, the 45 mailings of fraudulently completed sales tax returns, four of which occurred within the limitations period, amply satisfies the

statute's minimum requirements.[5] It is true that sustaining defendant's RICO conviction based solely on these 45 acts (which, of course, the Court did not) assumes that the jury would have still found the pattern element satisfied. Such an assumption is appropriate here, however, given the similarity of proof on each of the mailings, the jury could not have rationally concluded that some of the charged mailings constituted a pattern while others did not. *See United States v. Weissman*, 624 F.2d 1118, 1124-25 (2d Cir. 1980). This same approach has been followed by other courts that have sustained RICO convictions once satisfied that the minimum requirements of § 1961(5) have been met. *See, e.g., United States v. Pepe*, 747 F.2d 632, 667 (11th Cir. 1984); *United States v. Walsh*, 700 F.2d 846, 852 (2d Cir. 1983); *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974).[6]

Third, defendant seeks reargument of the Court's holding that his real estate corporations and his retail gasoline operations were a "single enterprise" within the meaning of *Huber*. The Court sees no basis for reconsidering its earlier decision and declines to do so.[7]

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[5] Thus, the present case is distinguishable from *United States v. Ruggiero*, 726 F.2d 913 (2d Cir. 1984), where the court reversed a RICO conviction when it was impossible to tell whether the jury had unanimously agreed on at least two predicate acts. *See id.* at 922.

[6] There is also no merit to defendant's claim that the Supreme Court's decision in *McNally v. United States*, 55 U.S.L.W. 5011 (June 24, 1987), undercuts the justification for the mail fraud prosecution here. Unlike *McNally*, the fraud charged here involved a scheme to deprive the State of New York of substantial property rights and, therefore, falls squarely within the scope of the mail fraud statute as interpreted by *McNally*.

[7] Defendant argues that testimony from Murray Katz concerning the defendant's reasons for operating many separate corporations pertains only to the retail operating corporations. This, however, does not alter the Court's conclusion that the jury could have rationally found that defendant's real estate and retail companies were part of a single enterprise within the meaning of *Huber*.

Further, the Court sees no basis for setting aside the forfeiture verdict based upon the recent holdings in either *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46 (2d Cir. 1987), or *United States v. McKeithen*, No. 86-1384, slip op. (2d Cir. June 30, 1987). As an initial matter, *McKeithen* only implicates the jury's reliance on the "source of influence" theory of forfeiture contained in § 1963(a)(2)(D), and *Beck* only arguably deals with this same provision. As already noted, the jury's verdict also found forfeiture appropriate under § 1963(a)(1) and (3).[8] In all events, the question be-

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[8] As noted above, defendant, through new counsel, challenged in his Rule 29 motion the government's reliance upon § 1963(a)(3) on *ex post facto* grounds. Although the Court did not reach the issue in deciding defendant's motion, it does so now and rejects defendant's claim.

In order to constitute *ex post facto* punishment, a penal law must apply to events occurring prior to its enactment and must disadvantage the defendant affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). Defendant claims that § 1963(a)(3) is an unconstitutional *ex post facto* law as applied to his interests in any properties "derived" from racketeering proceeds. As discussed in the Court's prior memorandum, the Supreme Court's decision in *United States v. Russello*, 464 U.S. 16 (1983), supports a reading of the word "interest" in § 1963(a)(1) to include both direct proceeds and assets purchased with those proceeds. In addition, the legislative history of the Comprehensive Crime Control Act of 1984, which added § 1963(a)(3), clearly states that Congress intended to clarify the meaning of § 1963(a)(1) in response to judicial decisions narrowing its intended scope:

> "Paragraph (3) is new, and specifically provides for the forfeiture of proceeds derived from prohibited racketeering activity or unlawful debt collection. Both direct and derivative proceeds are forfeitable. As noted above, several courts have held that racketeering proceeds are not encompassed within current RICO forfeiture provisions and Supreme Court review of this issue is now pending. This limiting interpretation has significantly diminished the utility of the RICO criminal forfeiture sanction and is at odds with the overall purpose of this statute. Clarification of the forfeitability of racketeering

fore the court in *Beck* was whether the alleged enterprise was sufficiently continuing to constitute an "enterprise" under 18 U.S.C. § 1961(4). The court held that, when an association-in-fact enterprise has "but one straight-forward, short-lived goal," it ceases to function once the goal is achieved and, therefore, is not sufficiently continuing to satisfy RICO. *Id.* at 51. As the *Beck* court recognized, however, it did not have before it an enterprise such as the one alleged in *United States v. Ianniello*, 808 F.2d 184 (2d Cir. 1986) (and the present case), which had no obvious terminating goal or date and functioned in ways apart from racketeering activity. Consequently, *Beck* does not stand for the broad proposition that, whenever an enterprise-in-fact ceases racketeering activity prior to indictment, the forfeiture provision of § 1963(a)(2)(D) is inapplicable. Not only was this question not before the Court, but defendant's reading of the opinion would eviscerate § 1963(a)(2) since it would prohibit the forfeiture of any property still in defendant's control, including the defendant's interest in the enterprise itself, whenever the enterprise had ceased to engage in racketeering activity prior to indictment.[9]

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proceeds has been included in past forfeiture legislation and criminal code revision legislation."

S. Rep. No. 225, 98th Cong., 1st Sess. 199, *reprinted in* 1984, U.S. Code Cong. & Admin. Nes, 3182, 3382.

Based on *Russello* and this legislative history, one district court has held that application of § 1963(a)(3) to derivative proceeds does not constitute *ex post facto* punishment. *United States v. Rogers*, 602 F. Supp. 1332, 1340-41 (D. Colo. 1985). In addition, although the precise basis of forfeiture is difficult to determine, it appears that in *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987), a case relied upon by defendant, the Ninth Circuit approved of the application of § 1963(a)(1) to property derived from racketeering proceeds. *Id.* at 1415 n.5.

[9] Furthermore, the Court need not decide whether § 1963(a)(2)(D) was improperly applied to property acquired after the racketeering activity ceased since all of this property was also forfeited pursuant to § 1963(a)(1) and (3).

In *McKeithen*, the government sought forfeiture of three parcels of property pursuant to 21 U.S.C. § 848(a)(2)(8), which permits forfeiture of property "affording a sourse of influence" over a narcotics enterprise. Pursuant to a special interrogatory, the jury forfeited only 43% of one of the parcels (and all of the other two) which contained an apartment building shown to have no connection with the enterprise. *Id.* at 4190. Notwithstanding the jury's verdict, the district court ordered forfeiture of the entire parcel on the ground that, it could not be legally subdivided. The Court of Appeals reinstated the jury's allocation of taint, rejecting the government's position that the statutory language did not permit proportional forfeiture. In a narrow holding, but one which applies equally to § 1963(a)(2)(D) forfeitures, the court stated that forfeiture under a "source of influence" theory "means, at least in the context of realty subject to forfeiture, that specific portion of a defendant's property affording a source of influence over the enterprise. In other words, 'to forfeit property a connection must be shown with that which offends.' *United States v. About 151.628 Acres of Land*, 99 F.2d 716, 720 (7th Cir. 1938)."

McKeithen, however, is distinguishable from the present case since there it was uncontroverted that one of the two buildings did not have any connection with the enterprise whatsoever, while here the evidence indicated extensive if not exclusive involvement of defendant's corporations in various aspects of the enterprise. Furthermore, *McKeithen* does not stand for the proposition that, in order for a defendant's entire interest in an entity to be forfeited under a source of influence theory, the government must establish beyond a reasonable doubt that 100% of the defendant's interest in the entity was used to commit or facilitate the commission of racketeering activity. The "connection" between the forfeited property and "that which offends" required by *McKeithen* is

satisfied by the fact that the property affords a source of influence over an enterprise which itself is conducted through a pattern of racketeering activity.

Similarly, there is even less support in *McKeithen* for defendant's efforts to avoid forfeiture of the non-enterprise companies forfeited under either § 1963(a)(1) or (3). Assuming *arguendo* that proportional forfeiture is appropriate under these sections, forfeiture of defendant's entire interest in these properties must still be sustained since the proof at trial showed that, but for his tax fraud, defendant would not have been able to stay in business at all. Thus, the fact that defendant's companies earned money apart from the withheld sales taxes is not apposite in the present case since the forfeiture provisions do not require the direct tracing of racketeering proceeds when the entities' very existence depends upon defendant's racketeering activity.

Finally, defendant seeks reconsideration of the Court's rejection of his eighth amendment challenge to the forfeiture. Alternatively, he seeks amelioration of the forfeiture. Reconsideration of the eighth amendment claim is again denied, although eighth amendment considerations may have their place at the time of sentencing, when a judgment of forfeiture will be entered pursuant to 18 U.S.C. § 1963(e) "upon terms and conditions as the Court shall deem proper." *See also Huber, supra*, 603 F.2d 396-97.

Presentence Report

Defendant challenges the factual basis for the statement in the presentencing report that, "[f]rom the end of 1979 until March, 1982, Porcelli also directed Katz to sign a phony name to these returns." Acknowledging that this statement does not accurately reflect the testimony at trial, the government proposes the following amendment to the presentence report: "In June of 1979, Porcelli learned that Katz, at his initiative, had been

signing a phony name to these returns, and he asked Katz to continue this practice."

The Court has reviewed the portions of the transcript that the government contends supports this statement. While Katz' testimony is somewhat unclear, it is fair to conclude that he intended to testify that defendant asked him to continue his practice of signing a phony name as vendor on defendant's tax returns. Accordingly, the Department of Probation is directed to amend the presentence report to include the language proposed in the government's memorandum.

The Court reserves decision on defendant's application for a stay pending appeal until the date of sentencing.

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

Dated: Brooklyn, New York

September 16, 1987

/s/ Charles P. Sifton
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CR-85-00756(S)

UNITED STATES OF AMERICA

vs.

OSCAR PORCELLI,
Defendant.

In the presence of the attorney for the government the defendant appeared in person on this date Sept. 30, 1987

Counsel

X With Counsel Vivian Shevitz, Esq.

Finding & Judgment

There being a verdict of X Guilty of counts (1) through (62). Defendant has been convicted as charged of the offense(s) of violating Title 18, U.S.C., Sections 2; 1341; 1962(c) and 1963.

Sentence or Probation Order

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period

of two (2) years on each of Counts 1 through 62. The defendant is to serve six (6) months of the sentence. Execution of the remainder of the custodial sentence is suspended, and the defendant is placed on probation for a period of five (5) years, to commence following his release from custody. The sentences on Counts 2 through 62 are to run concurrently with that imposed on Count 1 and with each other.

Special Conditions of Probation

As a special condition of probation defendant shall make restitution in the amount of $4,755,000.00 to the State of New York upon such terms and conditions as the Department of Probation shall direct. The defendant is to receive credit for any sums paid to or collected by the State of New York pursuant to the judgment of forfeiture or civil tax proceedings.

As a further condition of probation, defendant shall cooperate in all proceedings leading to a determination of all other sums due and owing the State of New York for unpaid sales taxes, penalties, and interest for the period 1978 through 1982 and shall promptly pay to the State of New York all such sums determined to be due and owing after notice and opportunity for a hearing, with credit for any sums paid to New York State pursuant to the judgment of forfeiture or in restitution and without prejudice to defendant's right to seek a refund of any amounts found upon review of the initial determination of liability to have been erroneously paid or collected.

On the motion of Steven Gold, Assistant United States Attorney, indictment CR-85-00756 and Counts 63 through 66 of the within indictment are dismissed.

Additional Conditions of Probation

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation

The court orders commitment to the custody of the Attorney General and recommends.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ Charles P. Sifton
U.S. District Judge
9/30/87

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CR-85-00756 (S)

UNITED STATES OF AMERICA,

-against-

OSCAR PORCELLI,

Defendant.

JUDGMENT OF FORFEITURE

Defendant, Oscar Porcelli, having this day been convicted of an offense under section 1963 of title 18, United States Code, and a jury having returned a verdict of forfeiture against him on December 17, 1986, and the undersigned having heard the parties with respect to this matter, it is

ORDERED, ADJUDGED, AND DECREED that the monies belonging to the defendant and properties listed in the annexed Schedule A are hereby declared forfeited to the United States of America, and the Attorney General is authorized to seize all monies and properties ordered forfeited upon the following terms and conditions:

(1) All monies seized shall be paid to the State of New York up to the amount of all unpaid sales taxes, interest, and penalties determined to be due and owing from the defendant for the period 1978 through 1982, after notice and an opportunity for a hearing.

(2) All other properties seized pursuant to this judgment shall be sold by the Attorney General and the proceeds together with any balance of the monies seized pursuant to paragraph (1) hereof shall be paid: (a) to the State of New York, up to the amount of any taxes, interest, and penalties which remain due and owing after payment of the forfeited monies pursuant to paragraph (1) hereof; (b) to the United States of America, up to an amount equal to twice the amount of sales taxes and interest determined to be owing by the defendant to the State of New York for the period 1978 through 1982, after notice and opportunity for a hearing; and (c) to the defendant, to the extent that there remains any such proceeds after payment of the sums required to be paid pursuant to paragraph (2)(a) and (b) of this judgment.

SO ORDERED.

Dated: Brooklyn, New York
September 30, 1987

/s/ Charles P. Sifton
United States District Judge

ENTER,

ROBERT C. HEINEMANN
Clerk of Court

By: /s/ [Illegible]
Deputy Clerk

SCHEDULE A

MONIES:	*OTHER PROPERTIES*:
$4,755,000.00	Gaseteria Oil Corporation
	Gasaver Petroleum, Inc.
	Libby Gasoline, Inc.
	E-Z Way To Go Corporation
	Ocoma Gas Corporation
	Fly Gas Incorporated
	Claudan Auto Center, Inc.
	Dameli Service Center, Inc.
	Gay Hy, Inc.
	2617 Gas Corporation
	Jero Gas Inc.
	Laff 300 Gas Corporation
	Terraneous Incorporated
	Ditmas Oil Associates, Inc.
	Noxxen Realty Corporation
	Fabrizio Realty Corporation
	Jimcar Realty Corporation
	Vinosca Realty Corporation
	Amron Realty Corporation
	Bosbay Service Center, Inc.
	Bruck Hunt Service, Inc.
	2 West End Auto Service, Inc.
	Christina Oil & Gas Distributors, Inc.
	Gasoline Alley, Inc.
	Lusa Realty Corporation
	Ditmars Management, Inc.
	MK Armored Services, Inc.
	4566 Service Center, Inc.
	281 Service Center, Inc.
	537 Service Center, Inc.
	P.S. Gasohol, Inc.
	Chamber Transport, Inc.
	Oseda Service Center, Inc.
	Curadee Petroleum, Inc.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of January one thousand nine hundred and Eighty-Eight [sic]

Present:

HON. JAMES L. OAKES, Chief Judge
HON. JON O. NEWMAN,
HON. JOHN F. KEENAN,* Circuit Judges

87-1440, -1451

UNITED STATES OF AMERICA,
Appellee

-v-

OSCAR PORCELLI,
Appellant.

Appeal from the United States District Court
for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the

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* Hon. John F. Keenan, of the United States District Court for the Southern District of New York, sitting by designation.

Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed in part, reversed and remanded to the said district court for further proceeding consistent with this opinion.

ELAINE B. GOLDSMITH
Clerk

/s/ Edward J. Guardaro
By: EDWARD J. GUARDARO
Deputy Clerk

APPENDIX J

SUPREME COURT OF THE UNITED STATES

No. A-789

OSCAR PORCELLI,
Petitioner

v.

UNITED STATES

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including May 15, 1989.

/s/ Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

Dated this 30th day of March, 1989.

APPENDIX K

PERTINENT STATUTORY PROVISIONS

The mail fraud statute, 18 U.S.C. § 1341 (1982), provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.* (1982), as in effect during the indictment period, provided in pertinent part:

> § 1961. Definitions
>
> As used in this chapter—
>
> (1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by

imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering pharaphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buy-

ing, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

* * * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * * *

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be

unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering

any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

The Act was amended in 1984 and 1986, after the indictment period, in ways not pertinent to the questions presented. *See* Pub. L. No. 98-473 (1984); Pub. L. No. 98-547 (1984); Pub. L. No. 99-570 (1986); Pub. L. No. 99-646 (1986).

Supreme Court, U.S.
FILED
JUL 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1842

In the Supreme Court of the United States

OCTOBER TERM, 1989

OSCAR PORCELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

17 pgs

QUESTIONS PRESENTED

Petitioner was convicted of multiple violations of the federal mail fraud statute and a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) in connection with a scheme to avoid paying $4,755,000 in New York State gasoline sales taxes. The questions presented are:

1. Whether the court of appeals properly rejected petitioner's contention that his mail fraud convictions should be reversed because his failure to pay the taxes did not deprive the State of its property.

2. Whether the court of appeals properly rejected petitioner's contention that his RICO conviction should be reversed because federal mail fraud violations based on failure to pay state taxes cannot serve as predicates for a RICO prosecution.

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In the Supreme Court of the United Stes

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No. 88-1842

OSCAR PORCELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 865 F.2d 1352. The district court's pretrial and post-trial opinions (Pet. App. 38a-42a, 43a-77a, 78a-95a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 102a-103a) was entered on January 11, 1989. A petition for rehearing was granted in part and denied in part on February 14, 1989 (Pet. App. 35a). On March 30, 1989, Justice Marshall extended the time in which to file a petition for a writ of certiorari to May 15, 1989, and the peti-

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tiorwas filed on May 12, 1989. The jurisdiction of this Cort is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on 6 counts of mail fraud, 18 U.S.C. 1341, and one count of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, by conducting the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(c)). The district court sentenced petitioner to concurrent terms of two years' imprisonment on each of the 62 counts and ordered petitioner to forfeit $4,755,000, but it suspended execution of all but six months of the custodial sentence and placed petitioner on probation for five years. Pet. App. 96a-98a. The court of appeals reversed petitioner's convictions on six of the mail fraud counts. It also reversed the forfeiture judgment and remanded that part of the case for further proceedings in the district court. In all other respects, the court of appeals affirmed. Pet. App. 1a-34a.

1. Petitioner is involved in the retail gasoline sales business in the New York City area. New York law requires that retailers register with the State, obtain a certificate of authority to collect sales taxes, and complete quarterly sales tax returns setting forth the total dollar amount of their quarterly sales and remitting the sales taxes due on those sales. The evidence at trial showed that from 1978 through 1982 petitioner used the United States mail to file some 100 fraudulent New York State sales tax returns from 12 retail gasoline stations that petitioner owned in whole or in part. As a result, petitioner failed to pay $4,755,000 in state gasoline sales taxes. Pet. App. 2a, 4a-6a, 14a, 44a, 47a.

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Petitioner began submitting the fraudulent sales tax forms in 1978, while he was in partnership with Jimmy Garcia Sorrentino. Petitioner and Sorrentino dissolved the partnership in 1979 and divided the jointly owned gas stations between themselves. Petitioner, who admitted that he exercised total control over his business, continued to submit fraudulent forms for the gas stations that he retained. He directed his accountant to prepare and file false sales tax returns for the various stations, to structure the corporate ownership of the stations to reduce the probability of detection, and to prepare a "dummy" set of records. In addition, he offered to pay his accountant $200,000 if the accountant would exculpate petitioner and accept full responsibility for the fraud. Pet. App. 4a-7a.

A New York state sales tax auditor determined, based on a comparison of petitioner's wholesale gasoline purchases and the sales reported on petitioner's returns, that petitioner's scheme had resulted in an enormous understatement of his tax liability. The auditor calculated that during the last year of petitioner's partnership with Sorrentino, petitioner and Sorrentino made more than $13,562,000 in gasoline sales, but they reported only $3,580,000 of that amount to state authorities, resulting in a sales tax underpayment of some $798,000. Similarly, the auditor determined that in the three-and-a-half year period following the termination of petitioner's partnership with Sorrentino, petitioner made more than $69,600,000 in gasoline sales, but he reported only $20,330,000 of that amount, resulting in a sales tax underpayment of $3,957,000. Thus, the auditor conservatively estimated that petitioner had failed to pay a total of at least $4,755,000 in state gasoline sales taxes. Pet. App. 6a.

2. Petitioner appealed the mail fraud convictions, the RICO conviction, and the judgment of forfeiture. He contended, among other matters, that this Court's decision in

McNally v. *United States*, 483 U.S. 350 (1987), required reversal of his mail fraud convictions and that RICO should not be applied to punish a failure to pay state taxes. The court of appeals rejected both of these arguments. The court interpreted *McNally* as limiting the reach of the mail fraud statute to schemes that have as their object the deprivation of property interests. Pet. App. 11a-12a. But the court concluded that "[b]y virtue of his scheme to defraud, i.e., the false sales tax returns, [petitioner] was in a very real sense 'depriving' the State of its property" (*id.* at 15a). The court also concluded that the RICO prosecution was appropriate "by virtue of the extraordinarily broad sweep of RICO" (*id.* at 3a). Judge Newman dissented, reasoning that this Court's decision in *McNally* required reversal of the mail fraud convictions and thereby eliminated the predicate for the RICO conviction.[1]

ARGUMENT

1. This Court ruled in *McNally* v. *United States*, *supra*, "that the mail fraud statute does not reach 'schemes to defraud citizens of their intangible rights to honest and impartial government,' and that the statute is 'limited in

---

[1] The court of appeals also decided a number of matters that are not at issue here. Specifically, the court rejected other challenges to the convictions, including a due process objection to the application of the mail fraud statute (Pet. App. 7a-10a), a challenge to the sufficiency of the evidence showing a racketeering enterprise (*id.* at 17a-22a), and a claim of ineffective assistance of counsel (*id.* at 26a-27a). In addition, the court reversed petitioner's conviction on six counts of mail fraud based on its determination that those particular mailings were not in furtherance of petitioner's scheme to defraud (*id.* at 10a-11a). It also reversed the judgment of forfeiture and remanded that portion of the case for further consideration based on its determination that some of the forfeited businesses may be subject to only partial forfeiture (*id.* at 22a-26a).

scope to the protection of property rights.' " *Carpenter* v. *United States*, 108 S. Ct. 316, 320 (1987) (quoting *McNally*, 483 U.S. at 355, 360). The Court explained that:

> the words "to defraud" commonly refer "to wronging one in his property rights by dishonest methods or schemes," and "usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching."

McNally, 483 U.S. at 358 (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)). See *Carpenter*, 108 S. Ct. at 321. The Court concluded that "Congress' intent in passing the mail fraud statute was to prevent the use of the mails in the furtherance of such schemes." *McNally*, 483 U.S. at 359.

Petitioner does not contest that he used a "dishonest method or scheme" of mailing false tax returns to avoid paying New York State sales taxes. Furthermore, petitioner concedes that, as a result of this deceit, he did not pay and continues to owe New York more than four million dollars in past taxes. Pet. 9, 20. Petitioner nevertheless contends that he did not "defraud" New York of those tax revenues because "the uncollected and unpaid taxes [petitioner] owed New York were not New York's money." *Id.* at 9. He further contends that his conduct, which he characterizes as simply "owing taxes and not paying them * * * cannot constitute mail fraud under *McNally*." *Id.* at 11. These contentions are without merit.

Petitioner unsuccessfully argued at trial that he had simply borrowed New York's tax revenues to cultivate business opportunities. See Pet. App. 47a, 85a. He now characterizes those supposed " 'loans' from the state" (Pet. App. 85a) somewhat differently in an attempt to fit this case within the principles of *McNally*. Petitioner contends

that he "could not be said to have deprived the State of its *money*, because he was not shown to have collected any sales taxes." Pet. 9 (emphasis in original). But petitioner's attempt to recharacterize his fraud does not alter the fact that he deprived New York of its property interest in the tax revenues generated by his gasoline sales. As the court of appeals explained:

> In fact, [petitioner], as he knew he was doing, obtained cash, and this is true whether or not he actually collected the sales tax on his gasoline sales. If he did not collect the tax, then he obtained funds that an honest retailer, selling for the same price, would have remitted to the State. If he did collect the tax (as would have been proven if there had been evidence that it was posted on signs) but failed to remit, then, of course, he obtained money and surely deprived the State. In any event, New York lost money as a result of [petitioner's] schemes, that is to say, lost the sales tax proceeds due from his sales of gasoline even though it maintains a civil right, or chose in action, to obtain the proceeds.

Pet. App. 12a. As the court of appeals further explained, New York law specifically recognizes that the State has a legally protected property interest in the tax revenues at issue, in the form of a tax obligation owed by petitioner, whether or not petitioner actually collected the tax at the time of his gasoline sales. *Id.* at 13a-15a. Petitioner thus defrauded New York by " 'wronging [the State] in [its] property rights by dishonest methods or schemes,' " *McNally*, 483 U.S. at 358 (quoting *Hammerschmidt*, 265 U.S. at 188), regardless of whether he notified his customers that he was collecting a tax. "By virtue of his scheme to defraud, i.e., the false sales tax returns, he was in a very real sense 'depriving' the State of its property." Pet. App. 15a.

Petitioner's additional contention that he was prosecuted for simply "owing taxes and not paying them" is also incorrect. This does not involve a mere "failure to pay taxes." Pet. 10. Petitioner used the mails in a dishonest scheme to *defraud* the State of New York by misrepresenting his tax obligations. As the court of appeals explained:

> A vendor may undertake to defraud the State by failing to collect sales taxes and then pocketing the money that he owes in taxes. This is quite different from "simply . . . failing to pay [a] debt."

Pet. App. 13a n.1. In this instance, petitioner "systematically underpaid his sales taxes and concealed what he was doing." *Ibid.* Although petitioner claims that he simply defrauded New York of its "ethereal interest" (Pet. 9) in the collection of tax revenues, that interest was sufficiently concrete that he could spend it, by his own admission, "on the expansion of his business." Pet. App. 85a. Because petitioner deprived the State of New York of a concrete property interest by means of a fraud that was executed through the use of the mails, petitioner's scheme fell within the reach of the mail fraud statute. See *United States* v. *Ianniello*, 808 F.2d 184, 193-194 (2d Cir. 1986), cert. denied, 483 U.S. 1006 (1987); *United States* v. *De Fiore*, 720 F.2d 757, 761-762 (2d Cir. 1983), cert. denied, 466 U.S. 906 (1984).[2]

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[2] There is no merit to petitioner's argument (Pet. 16-18) that the theory on which the court of appeals affirmed his convictions was not presented to the jury. The indictment clearly charged petitioner with defrauding the State of a property interest – namely, the sales tax due on the retail sale of gasoline – through petitioner's failure to file accurate tax returns. The trial court likewise instructed the jury on that charge. See C.A. App. 310-313. As the court of appeals explained, that instruction required the jury to find that petitioner "knowingly

Petitioner is also mistaken in asserting (Pet. 11-16) that the court of appeals' decision conflicts with decisions of other circuits. As the court of appeals recognized in this case (Pet. App. 8a-9a), other circuits have uniformly applied the mail and wire fraud statutes in schemes to defraud States of tax revenues. See *United States* v. *Melvin*, 544 F.2d 767 (5th Cir.), cert. denied, 430 U.S. 910 (1977); *United States* v. *Brewer*, 528 F.2d 492 (4th Cir. 1975); *United States* v. *Mirabile*, 503 F.2d 1065 (8th Cir. 1974), cert. denied, 420 U.S. 973 (1975); *United States* v. *Flaxman*, 495 F.2d 344 (7th Cir.), cert. denied, 419 U.S. 1031 (1974). Petitioner does not cite any of these cases, and none of the cases that petitioner does cite involves the application of the mail or wire fraud statutes to schemes to defraud States of tax revenues.

For example, petitioner contends (Pet. 11-12) that the court of appeals' decision conflicts with *United States* v. *Gimbel*, 830 F.2d 621 (7th Cir. 1987). In that case, an indictment charged that the defendant had engaged in a scheme to deprive the Treasury Department of "accurate

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and willfully defrauded the State of money due from sales taxes," Pet. App. 16a n.2, which accurately describes petitioner's offense.

Petitioner also claims (Pet. 11) that the trial court's specific intent instruction, which he did not challenge below (see Gov't C.A. Br. 20), allowed the jury to convict him even if the jury did not find that he deprived the State of property. He bases this claim on the instruction's language requiring the jury to find that petitioner's scheme contemplated some loss to the State or some gain to petitioner. See C.A. App. 315, 317. Petitioner now argues that giving the jury the alternative of convicting him if the jury found that he gained from his scheme violates *McNally*'s requirements. But in context, the jury could only have determined that petitioner "gained" from his scheme if the jury also found that the State was deprived of money owed to it. That is all the more clear in light of the fact that the trial court instructed the jury that the mail fraud charges involved defrauding the State of sales tax due. See Pet. App. 16a n.2.

and truthful information and data" concerning currency transactions. *Id.* at 626. The court concluded that the indictment was defective under *McNally* because "the jury was not required to find that the scheme resulted in the government being deprived of money or property." *Id.* at 627. *Gimbel* is thus clearly distinguishable from the instant case, where the jury was required to make such a finding. See Pet. App. 16a n.2. Furthermore, the Seventh Circuit in *Gimbel* specifically "express[ed] no view as to whether a scheme to deprive the government of tax dollars can ever be cognizable under the mail fraud statute." 830 F.2d at 627 n.3. Thus, there is no conflict between *Gimbel* and the decision in this case.

Petitioner also contends (Pet. 12-13) that the court of appeals' decision conflicts with a subsequent Seventh Circuit case, *United States* v. *Eckhardt*, 843 F.2d 989, cert. denied, 109 S.Ct. 106 (1988). In that case, the Seventh Circuit held that a wire fraud indictment alleging that the scheme impaired the federal government's determination and collection of income tax was defective under *McNally*. 843 F.2d at 996-997. The court emphasized, however, that the indictment was defective because it "does not specifically allege that [the defendant] deprived the government of revenue." *Id.* at 997. The court explained that "[t]he connection between the charged conduct and the loss of revenue here is too tenuous and speculative to constitute an actual deprivation of money or property." *Ibid.* In the present case, by contrast, the government specifically alleged and proved that petitioner had deprived the State of sales tax revenue. Thus, there is no conflict between the court of appeals' decision and *Eckhardt*.

Finally, petitioner cites (Pet. 13-19) a series of post-*McNally* cases that, like *McNally*, involve mail fraud prosecutions based on bribery of public officials. See, *e.g.*, *United States* v. *Egan*, 860 F.2d 904 (9th Cir. 1988);

United States v. *Slay,* 858 F.2d 1310 (8th Cir. 1988). Those cases, however, have little relevance here since, as petitioner concedes, he "was not a state official, nor did his conduct deprive anyone of a right to his 'honest services.' Pet. 19 n. 21. In any event, Congress recently amended the mail and wire fraud statutes to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right to honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. Thus, the mail fraud statute now expressly authorizes such prosecutions.[3] The post-*McNally* cases that petitioner cites are therefore of no continuing importance and provide no basis for this Court's review.

2. Petitioner also argues (Pet. 20-27) that court of appeals erred in affirming his RICO conviction. He contends that the federal government is not entitled to bring "a *criminal* RICO case for a failure to pay state taxes when that failure was *not* criminal under state law" (Pet. 21 (emphasis in original)). The predicate for petitioner's RICO prosecution, however, was not a "failure to pay state taxes." Rather, the government established a pattern of racketeering activity, in accordance with RICO's explicit provisions, based on petitioner's repeated violation of the mail fraud statute. RICO specifically identifies mail fraud as a "racketeering activity" (18 U.S.C. 1961(1) (Supp. V 1987)) and further provides that a "pattern of racketeering activity" may be established by "at least two acts of racketeering activity" (18 U.S.C. 1961(5)). The government's proof of more than 50 related mail fraud violations

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[3] The legislative history of the new provision indicates that Congress intended to nullify the *McNally* decision completely. See 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988) ("This section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change.").

during a four-year period amply demonstrated a pattern of racketeering activity punishable under RICO. See *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, No. 87-1252 (June 26, 1989).

Petitioner additionally argues that the court of appeals' decision conflicts with the Sixth Circuit's unpublished decision in *Michigan Dept. of Treasury* v. *Fawaz*, 848 F.2d 194 (1988) (Table). That case, however, does not create a conflict warranting this Court's review. As an initial matter, the unpublished decision has limited value as circuit precedent under the Sixth Circuit's local rules of procedure and would not bind future Sixth Circuit panels.[4] Even if it had meaningful value as precedent, it has little relevance to the present case. In *Fawaz*, the court of appeals held that a State is not entitled to bring a RICO civil action to collect unpaid state taxes because the State's use of this remedy "would demean the intent of those in Congress who sought to address the serious threat posed to the country's economy by organized crime." 8 RICO L. Rep. 160, 161 (1988). The court's concern that States would employ RICO's civil provisions "to designate district courts as collection agencies for unpaid state taxes" (*ibid.*) has no application in the present situation, where the federal government has brought a criminal racketeering prosecution based on petitioner's use of the mails in schemes to defraud.

Although petitioner asserts a "direct conflict" only with respect to the Sixth Circuit's *Fawaz* decision (Pet. 20), he also contends that the court of appeals' decision is inconsistent with the Eighth Circuit's decision in *Ornest* v. *Delaware North Companies, Inc.*, 818 F.2d 651 (1987),

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[4] See Sixth Circuit Rule 24(b) (stating that citation of unpublished decisions "is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case").

which affirmed the dismissal of a RICO complaint based on a " 'single fraudulent scheme' " (Pet. 23 (quoting 818 F.2d 652)). This Court, however, has recently rejected the Eighth Circuit's requirement that a RICO complaint allege multiple illegal schemes (*H.J. Inc.*, slip op. 5-6). There is therefore no live conflict between the decision of the court below and the Eighth Circuit with respect to the applicability of the RICO statute to a pattern of racketeering activity consisting of a single fraudulent scheme.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1989

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[5] Petitioner also claims that there is a conflict between the decision in this case and the Fifth Circuit's decision in *Delta Truck & Tractor, Inc.* v. *J.I. Case Co.*, 855 F.2d 241 (1988), cert. denied, 109 S. Ct. 1531 (1989), which he characterizes as insulating "legitimate" businesses from RICO prosecution (Pet. 23-24). The Fifth Circuit did not purport to insulate "legitimate" businesses (whatever that term means) from RICO liability. Instead, the Fifth Circuit held that a RICO complaint based entirely on a single business transaction did not adequately plead that the defendants were engaged in continuing criminal conduct of the sort reached by the RICO statute. In this case, petitioner's illegal conduct was not confined to a single transaction, but extended over a duration of several years and thus clearly reflected continuity of criminal activity.

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OSCAR PORCELLI,

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UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

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1. The Government, in its Brief in Opposition ("Opp."), does not defend the reasoning of the majority below, but instead argues a theory of the case expressly rejected by the Court of Appeals. Even the majority below recognized that Porcelli's conviction could not be sustained under *McNally* v. *United States*, 483 U.S. 350 (1987), on the theory that he deprived the State of sales tax revenue, because the prosecution failed to prove that he collected taxes owed New York. *See* Pet. App. 13a ("But did Porcelli *deprive* New York of its property? The answer to this question would be easy if Porcelli actually collected the tax on his sales. * * * However, the Government did not prove actual collection of the tax") (emphasis in original).

The majority below upheld the mail fraud convictions on the novel theory that Porcelli deprived the State of

its intangible "chose in action" to collect the taxes, by failing to disclose that he owed them. Pet. App. 15a-16a. The Government does not defend this reasoning—and in fact does not even mention it—because, as Judge Newman persuasively reasoned in dissent, it is clearly untenable after *McNally*. *See* Pet. App. 29a-33a. Instead, the Government argues that Porcelli deprived the State of sales taxes. *See, e.g.*, Opp. 8 n.2 (describing property interest allegedly taken from the State by Porcelli as the "sales tax due"), *id.* at 9 (asserting that Porcelli "deprived the State of sales tax revenue").[1]

2. As explained in the Petition, this Court has held that an individual who owes taxes "is a debtor and not a bailee;" he is "answerable for a tax" but does not hold the Government's property. *United States* v. *Johnston*, 268 U.S. 220, 226-227 (1925). *See* Pet. 10-11. Since such a debtor does not hold any property of the Government, failure to pay the debt cannot constitute depriving the Government of *its* property, as required under *McNally*.

The Government has no answer to this reasoning. Although the *Johnston* decision and recent Court of Appeals cases applying it were clearly set forth and relied upon in the Petition, Pet. 10-11 & n.6, the Government does not even cite—much less attempt to distinguish—*Johnston* or the other cases. If the Government is right, this Court was wrong in *Johnston*.

3. The Government distinguishes the conflict cases cited in the Petition only by relying on its rejected theory of the case, rather than the theory actually adopted by the majority below. The cases cited by Petitioner stand for the proposition that concealing information from the

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[1] The Government's error is perhaps clearest when it contends that the property interest taken from the State "was sufficiently concrete that [Porcelli] could spend it." Opp. 7. Porcelli could not, of course, "spend" New York's chose in action—the only "property" interest the majority below ruled he took from the State.

Government—information that, if known, may have led the Government to take steps to *obtain* money or other property—does not constitute depriving the Government of *its* property under *McNally*. *See* Pet. 11-16. As Judge Arnold noted recently for the Eighth Circuit, "[w]ithholding valuable information from the City is not the same thing as depriving the City of its property, and only the latter conduct violates the mail fraud statutes." *United States* v. *Slay*, 858 F.2d 1310, 1316 (8th Cir. 1988). This Court made the same point in *McNally* itself, ruling that a mail fraud violation could not be predicated on the defendants' "failure to disclose their financial interest * * * to other persons in the state government whose actions could have been affected by the disclosure." *McNally*, 483 U.S. at 361 n.9.

The ruling below conflicts directly with this authority. Contrary to the Government's misreading, the majority recognized that Porcelli could not be considered to have taken tax money that belonged to New York. It held instead that he temporarily deprived the State of its "chose in action"—its claim to collect tax monies—a claim which "the State did not even know about." Pet. App. 14a, 16a. The Government can reconcile the ruling below with *McNally* and the conflict cases cited by Petitioner only by rewriting the opinion below.[2]

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[2] The Government chides Petitioner for failing to cite certain cases applying the mail and wire fraud statutes to state tax fraud, but each of those cases was decided before *McNally*, and thus did not consider *McNally*'s requirement that the defendant deprive the State of property it holds as opposed to property it might otherwise obtain. *See McNally*, 483 U.S. at 359 n.8 (mail fraud statute limited to protecting "Government's interests as property *holder*") (emphasis added). As Judge Newman noted in dissent, "*McNally* requires us to reconsider the continued validity of that line of cases." Pet. App. 29a (citing the same cases relied on by the Government).

4. The Government's revisionism is also its only response to Judge Newman's point that the majority's theory was never "charged in the indictment, nor presented to the jury." Pet. App. 33a. *See* Pet. 16-18. The Government correctly notes that the indictment charged Porcelli with depriving the State of sales taxes and that the instructions required the jury to find that he defrauded the State of money due from sales taxes. *See* Opp. 7-8 n.2. The problem is that, as noted, this was not the theory on which the majority sustained the conviction. The Government does not dispute that *neither* the indictment *nor* the jury charge made any reference to deprivation of a chose in action, the property interest on which the majority relied. *See* Pet. 17 n.16; Pet. App. 33a (Newman, J., dissenting).

Nor does the Government claim that the jury instructions were correct under *McNally*. That case requires a finding that the victim was deprived of property; gain to the defendant is not sufficient. *See* 483 U.S. at 360; Pet. 11. The jury here was expressly told it could convict Porcelli on the basis of "*either* some loss to a victim *or* a gain to the schemers." Ct. App. JA A-315 (emphasis added). The most that the Government can argue is that, "in context," the jury must have found loss to the State if it found gain to Porcelli. Opp. 8 n.2. But that of course is not at all true, given the majority's theory that the pertinent property interest was the State's "chose in action" and not the sales taxes themselves. The jury was never instructed on "choses in action," nor does any gain to Porcelli from failing to pay taxes necessarily encompass a deprivation of the State's chose in action. Indeed, the State *retained* this chose in action at all times.

5. The Government does not question the broader significance of the divided decision below. In particular, the Government does not dispute Petitioner's statements that the case "is in no sense fact-bound" and that "[i]f

the decision below is permitted to stand, every case of underpaid state taxes in which the state returns are sent through the mail would become not simply a matter of state concern, but a federal criminal mail fraud case." Pet. 18. Such a startling result should not be sanctioned without review by this Court.

6. As explained in the Petition, this case also merits review because it permits the use of a federal RICO prosecution to collect state taxes, contrary to the recent decision of the Sixth Circuit in *Michigan Dept. of Treasury* v. *Fawaz*, 848 F.2d 194, 8 RICO L. Rep. 160 (6th Cir. 1988). The Government's first answer is that the conflict need not be resolved because the Sixth Circuit decision was not intended for publication, *see* Opp. 11, but this Court has rejected the unsettling notion that it need not concern itself with unpublished circuit opinions.[3]

The Government next dismisses the conflict on the ground that *Fawaz* involved a civil action, whereas this case was a criminal one. But that point only emphasizes the extreme departure from ordinary RICO jurisprudence that the Federal Government has undertaken in this case. In *Fawaz*, the State itself brought a *civil* RICO action for conduct that was a *crime* under *state* law. Here, the Federal Government brought a *criminal* RICO action to collect taxes for the *State*, when the failure to collect and pay the taxes was *not* a crime under state law. If such an approach is permitted to stand, state and federal revenue collectors can be expected to resort to RICO's draconian provisions in lieu of state law with regularity. *See Illinois Dept. of Revenue* v. *Phillips*, 771 F.2d 312, 317 (7th Cir. 1985).

Even the majority below recognized that "the prosecution of a state sales tax evader for a RICO violation pushes that law to its outer limits, especially when that tax evasion was not made criminal by the state itself at

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[3] *See C.I.R.* v. *McCoy*, 108 S. Ct. 217, 219 (1987).

the time that the fraudulent returns were filed." Pet. App. 3a. This troubling and understated fact is not even acknowledged by the Government.

As for the conflict among the Circuits, the objective both here and in *Fawaz* was to use RICO to collect state taxes, which the court permitted in this case, *see* App. 99a (judgment directing payment to New York of "all unpaid sales taxes, interest, and penalties" out of forfeiture), but the Sixth Circuit struck down in *Fawaz*. *See* 8 RICO L. Rep. at 161 (declining "to designate the district courts as collection agencies for unpaid state taxes").

7. Application of the mail fraud statute and, in turn, RICO to federalize and criminalize conduct that was not criminal under state law not only violates the intent of Congress with respect to both statutes, but also contravenes the defendant's due process rights—a challenge specifically raised below.[4] State law provided only civil penalties for Porcelli's conduct, yet the court below construed the mail fraud and RICO statutes to permit criminal prosecution under the most severe statute in the federal prosecutor's arsenal.[5] The result was the forfeiture of Porcelli's legitimate business to the federal government, when he was liable only for civil penalties under state law.[6] Yet the Government fails even to address the significance of the fact that what Petitioner did was *not*

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[4] *See* Ct. App. Br. for Appellant, at 22-23.

[5] *See H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 57 U.S.L.W. 4951, 4958 (U.S. June 26, 1989) (lack of clarity and predictability in application of RICO renders statute vulnerable to constitutional challenge) (Scalia, J., concurring in judgment, joined by the Chief Justice and Justices O'Connor and Kennedy).

[6] The Government professes difficulty in understanding the term "legitimate businesses," *see* Opp. 12 n.5, but this Court had no similar difficulty in *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 57 U.S.L.W. at 4954 (referring to a "legitimate business" as one that "is not a business that exists for criminal purposes").

a crime under state law. This omission speaks volumes about the importance of this case and the potential for harm it represents in the area of criminal law.

CONCLUSION

For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision below.

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